NO. 84-56

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY WILLIAMS CAZALAS,

Petitioner

versus

UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL WILLIAM FRENCH SMITH, BENJAMIN CIVILETTI, ATTORNEY GENERAL of the UNITED STATES, and UNITED STATES ATTORNEY JOHN VOLZ,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

1. Whether the Defendants discriminated against Mary Williams Cazalas on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e–1 *et seq.*

2. Whether the Defendants denied Mary Williams Cazalas Freedom on Speech guaranteed her by the First Amendment to the Constitution of the United States.

3. Whether the Defendants denied Mary Williams Cazalas due process of law guaranteed her by the Fifth Amendment to the Constitution of the United States.

4. Whether John Volz and Benjamin R. Civiletti are personally liable to Mary Williams Cazalas for violation of her rights guaranteed by the United States Constitution.

PARTIES TO THE PROCEEDING

The following listed persons have an interest in this case.

1. Mary Williams Cazalas, Petitioner
2. Benjamin Civiletti, Respondent
3. William French Smith, Respondent
4. John Volz, Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Mary Williams Cazalas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 7, 1984.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto as Appendix A. The opinion of the District Court for the Eastern District of Louisiana in this case is cited as Cazalas v. United States Department of Justice, et al., 569 F. Supp. 213 (E.D. La., 1983), and the opinion appears as an Appendix B hereto.

JURISDICTION

District Court jurisdiction is pursuant to 28 U.S.C. Sec. 1343(1) and (4); 42 U.S.C. Sec. 2000e-1 *et seq.*, U.S. Constitution. Judgment for the Fifth Circuit entered May 7, 1984. No petition for rehearing filed. Petition for certiorari was filed within 90 days of the date of judgment. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following Statutes and Rules are set forth in Appendix C hereto.

United States Constitution, Amendment I
United States Constitution, Amendment V
Title VII of the Civil Rights Act of 1964, as amended 1972
42 U.S.C. Section 2000e- *et seq*

STATEMENT OF THE CASE

Plaintiff-Petitioner filed an informal Equal Employment Opportunity Complaint with the United States Department of Justice on October 7, 1978, and a formal complaint on November 9, 1978. She filed a complaint alleging retaliation on April 21, 1979. The basis for these complaints was sex discrimination. She was also denied freedom of speech and due process which grew out of the following facts.

On February 16, 1971, Plaintiff-Petitioner, Mary Williams Cazalas was employed as an Assistant United States Attorney for the Eastern District of Louisiana. She was employed to handle the appellate docket because of her background and because of her experience in legal research and writing while employed by Judge Godfrey Z. Regan at the

Louisiana Fourth Circuit Court of Appeals. During the course of her employment as an Assistant United States Attorney, she wrote over three hundred appellate briefs and argued in the Fifth Circuit Court of Appeals all but about six of the cases set for oral argument. She was also assigned complicated research for others in the office. Although her assignment was the appellate docket, she handled collateral attacks on convictions and sentences and the NARA docket which consisted of commitment of drug addicts for treatment under the Narcotic Addict Rehabilitation Act of 1966. In 1977, in addition to the above dockets, numerous civil cases, including the social security disability docket, were assigned to her. (Vol. 7, Tr. 35, 56-57, 70, 75, 100; P-12) She was the librarian.

There was sex discrimination in the United States Attorney's Office during the tenure of Gerald J. Gallinghouse as United States Attorney. Plaintiff-Petitioner was given the responsibility equal to male supervisory personnel. She was chief of the appellate section, but she was not given the title nor pay of a chief. Attesting to recognition of her skills and ability, are the very highly complimentary letters which Gerald Gallinghouse wrote and sent to her superiors in the United States Department of Justice in Washington, D. C., in connection with his request for raises for Plaintiff-Petitioner between 1971 and 1977, and his request in 1974 for a special achievement award in recognition of her superior performance in representing the United States. (Appendix D; Tr. 48, 51-53; Exhibit P-12) She handled the appeals of almost all criminal cases and some civil cases in the United States Attorney's Office for the Eastern District of Louisiana between 1971 and 1979 with a very excellent success record. Approximately three hundred briefs written by Mary Williams Cazalas have been filed into evidence as Exhibit P la, Tr. 70-75. She did the work of a chief of the Appellate

Section and on occasion Gallinghouse referred to her as Chief of the Appellate Section, however, she was not given the title. She learned that Gallinghouse mentioned in a letter written about 1973 that such an assignment was made known to the United States Department of Justice in Washington, D. C., when she obtained her personnel file on March 7, 1979, and the highly complimentary letters written by Gerald Gallinghouse were contained therein. (Tr. 52, 116-117)

There was discrimination against other females in the United States Attorney's Office during Gallinghouse's tenure as set forth in Plaintiff's complaint. (R. 1-23; D-1) Elaine Chauvin was never appointed as Chief of the Civil Division although she was more qualified and had more seniority then males who were appointed to the position of Chief. Females, including Plaintiff-Petitioner, were denied the opportunity to try criminal cases. Only males, regardless of experience and seniority, were assigned as trial attorneys to the Criminal Division until Kathleen Walsh Carland was employed about 1975. (Tr. 71-72) James D. Carriere informed Joscelyn De Ville that he had a position open in the Criminal Division but not in the Civil Division and he did not employ women to work in the Criminal Division. (Tr. 731-732) She made a public statement regarding this at a Federal Women's Program. (Tr. 732-736) Kathleen Walsh Carland was employed as an Assistant United States Attorney about September or October of 1975. She was the first woman employed as a trial attorney in the Criminal Division. She stated in her deposition and in her affidavit to the EEO investigator, Ray Saporito, that there was sex discrimination in the United States Attorney's Office during her employment there between September or October of 1975 to the time of her resignation in September of 1977. (Exhibit D-106, Affidavit of Kathleen Walsh)

Male Assistant United States Attorneys attempted to take credit for Mary Cazalas work and to use her as a female law clerk for male attorneys. James D. Carriere admitted asking Gallinghouse to permit the trial attorneys in the Criminal Division, who were all male, to take her briefs and use them to argue the cases before the Fifth Circuit Court of Appeals when they wished to do so instead of permitting her to argue the cases which she had written. She protested this because it would have demoted her to their female law clerk, and Gallinghouse agreed and refused his request.

Carriere stated in his affidavit to Ray Saporito that in 1974 he considered Mary Cazalas to be intolerable and he made his mind up that she would have to submit a resignation and leave the employ of the United States Attorney's Office, but Gallinghouse would not adopt his recommendations, as indicated by a superior performance award presented to Mary Cazalas at Gallinghouse's request in the same year, 1974. (P-10) Although Carriere sought to have Plaintiff terminated, he admitted that ". . . What Mary would do would be take a district court trial transcript and dictate usually at home. She was a hard worker, Mary, and I presume she still is, and an example, Mary is a beaver type worker, will work twenty-four hours a day. I take nothing from Mary's getting in and doing something. . . ." (Tr. 93-98; 125; D-137, Affidavit of Carriere)

Following appointment of John Volz as United States Attorney, about March 1, 1978, an increased degree of sex discrimination was practiced against Mary Cazalas and other women in the United States Attorney's Office for the Eastern District of Louisiana. Volz demoted Mary Cazalas from the position of de facto Chief of the Appellate Section and he appointed a less qualified male with less seniority, Robert Boitman, and gave him the title of Chief of the Appellate

Section. Mary Cazalas had handled over 300 appellate cases. Boitman had handled approximately five cases and she had assisted Boitman with some of these. (Tr. 130-134; 136-140) Elaine Chauvin, who was best qualified and with most seniority in the Civil Division, was never appointed by Volz to the position of either Chief or Deputy Chief. She was de facto Deputy Chief of the Civil Division during Gallinghouse's tenure, but to her knowledge, she was never officially appointed. Volz demoted the only woman chief, Michaelle Pitard, from Chief of the Civil Division to Deputy Chief of the Civil Division. He appointed Rick Simmons to her position as Chief of the Civil Division. Simmons had just been appointed to the position of Assistant United States Attorney and he had less seniority and less experience in civil litigation in the Justice Department than either Elaine Chauvin or Michaelle Pitard. Ms. Pitard stated in her affidavit to Ray Saporito, the EEO investigator, that she was upset because Volz demoted her. (Tr. 136-140; D-137, Pitard Affidavit) Volz did not promote Pitard to Chief of the Civil Division until about October 26, 1978, which was 19 days after Plaintiff-Petitioner filed her EEO complaint of October 7, 1978. No one was appointed to the position of Deputy Chief. (Vol. 9, Tr. 607-610; Exhibit D-137, Pitard Affidavit)

In addition to demoting Plaintiff-Petitioner, almost immediately, John Volz and his chiefs embarked on a campaign to harass her in an effort to force her to resign or leave voluntarily. Her resignation would have removed the threat of disclosure of the obvious and indefensible discrimination practiced by Volz in appointing Boitman, a less qualified white male, as Chief of the Appellate Section, and as supervisor of Plaintiff-Petitioner who had far more experience than Boitman and who had even assisted Boitman with his cases. (P-58, P-29, P-30, P-31, P-60, P-56B) Volz sent a teletype to William Tyson in which he expressed his intention to

document complaints in order to terminate Mary Cazalas. (P-60 Tr. 152-165, 170-175, P-53– A, B, C, D, I, J, K, L, P, Q, R)

On September 30, 1978, Plaintiff–Petitioner was subjected to further unjustified criticism and harassment in her handling of the case of *Edward Lee Wright v. United States.* She filed a brief in the *Wright* case in the Fifth Circuit Court of Appeals in which she conceded error of the judgment in the district court because this was the only justified position based on the law and the facts. Plaintiff gave a copy of the brief to Boitman, the less competent white male who had been made her supervisor as Chief of the Appellate Section. Boitman told Plaintiff that she should not have conceded error and "When you are ahead, you stay ahead and you cook up an answer for the court". Plaintiff-Petitioner refused to change her brief and she told Boitman that she does not lie to the Court. Had Plaintiff-Petitioner not conceded error when the facts and law so indicated, she would have violated the Canons of Professional Ethics of the American Bar Association, the Louisiana State Bar Association, and the policies of the United States Department of Justice. Apparently, Boitman, her less competent and less experienced supervisor, did not understand the role of a prosecutor in the United States Department of Justice when he instructed her to "cook up an answer for the court". (Tr. 88-90, 131-134; Statement to Morman, P-17A; Statement to Saporito, P-137; P-54A-L)

On the afternoon of September 30, 1978, after Plaintiff-Petitioner refused to change her brief by "cooking up an answer" for the Fifth Circuit Court of Appeals as instructed to do by Boitman, she and Boitman walked together to their automobiles. Enroute, they met Robert Glass, a highly respected attorney who practices much criminal law. She asked Glass whether, in his opinion, it is the ethical duty of a

prosecuting attorney to concede error when the facts and law do not support the district court's ruling. Boitman wrote a memorandum dated October 3, 1978, to John Volz in which he stated it was he, not Plaintiff, who disclosed the identity of Wright when he showed Glass the brief. Actually no brief was shown to Glass and the *Wright* case was never discussed with Glass. (Tr. 821-831; Glass' statement to Mormon, P-17A)

After Plaintiff-Petitioner filed her brief in the *Wright* case, Boitman withdrew the brief filed by her. (Tr. 88-89; P-54E) He filed a brief written by him. (P-54F) He filed a subsequent brief. (P-54L) In the case of *Edward Lee Wright v. United States*, Fifth Circuit Court of Appeals No. 78-2307, the docket sheet reflects these substitutions of briefs. On November 6, 1978, Document No. X was filed. Robert L. Lee, Official Court Reporter for the United States District Court, stated that Document No. X is:

> "Corrected transcribed proceedings taken in the above numbered and entitled cause on November 4, 1964, in open court, The Honorable Robert A. Ainsworth, Jr., Judge, presiding, the previous transcript having been made from a partially unintelligible tape recording - - the present transcript from the reporter's shorthand notes."

This transcript shows that the maximum penalties were told to Edward Lee Wright by John C. Ciolino, the Assistant United States Attorney, on November 4, 1964. This transcript is quite different to the transcript of the same proceedings on November 4, 1964, that was in the record at the time Mary Williams Cazalas wrote her appellate brief in the *Wright* case. The original transcript did not reflect

the defendant was told the maximum penalties. The transcript reads as follows:

> "Proceedings taken in the above numbered entitled cause on November 4, 1964, in open court, The Honorable Robert A. Ainsworth, Jr., Judge, presiding." (P-541)

On that transcript placed in the record in 1965, the same official court reporter certified that:

> "I hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above titled and numbered cause taken by me on November 4, 1964, to the best of my ability and understanding." (P-54A)

The question of credibility of Document No. X is raised.

Boitman did circulate a memorandum after he was made Chief of the Appellate Section in which he asked that briefs be submitted to him. Although Mary Williams Cazalas had received this memorandum, she had discussed it with Assistant United States Attorney Ernest Chen, who told her he did not believe Boitman meant for him and Mary Cazalas to submit their briefs because they were far more experienced than Boitman. Mary Cazalas filed two social security briefs and gave copies to Boitman after filing them prior to the time she filed the *Wright* brief. (Tr. 130-134) Boitman did not instruct Mary Cazalas to proceed differently in the future. Had he done so, Mary Cazalas would have given him the briefs in accordance with his memorandum. This was certainly not sufficient to conclude that Mary Williams Cazalas was not supervisable.

On October 3, 1978, at about 3:45 P. M., Plaintiff-Petitioner was called by Volz to his office. Volz had present with him Dan Bent, Albert Winters, Rick Simmons, and Michaelle Pitard. Volz told Plaintiff-Petitioner that she was not supervisable because of the incident with Boitman relative to the filing of the *Wright* brief. Volz read the memorandumwritten by Boitman. Plaintiff-Petitioner was told to look for other employment because she had refused to "cook up an answer for the court" in the Edward Lee Wright brief as instructed by Boitman. Volz also accused her of discussing office policy with persons outside the United States Attorney's Office. She had not discussed office policy but rather ethical conduct of prosecuting attorneys. For Volz to condemn such a discussion and use it as a pretext for firing her is a violation of her right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States. Even the pretextual reasons for sex discrimination used by Volz and his chiefs against her are invalid and a violation of rights guaranteed by the Constitution of the United States. Apparently, Volz did not believe these reasons adequate for termination since he did not proceed at that time to request that she be terminated. This was merely further harassment. (D-83, D-87; Tr. 92)

After Plaintiff-Petitioner filed her EEO complaint on October 7, 1978, she was subjected to increased and intensified harassment until the time of her termination on April 20, 1979. She was called to Volz's office for numerous conferences between October 3, 1978, and April 4, 1979, at which she was harassed, humiliated and embarrassed by Volz and his chiefs. They falsely accused her of lying and of committing errors concocted by them. Entire dockets and individual cases were taken from her without cause and she was falsely accused of incompetence in handling cases assigned to her and in handling cases not assigned to her

but which she merely assisted on (P-30A, P-31A-F; Tr. 252-254, 244-262) This is clearly in violation of Section 704a of Title VII of the Civil Rights Act.

John Volz sent a letter dated December 29, 1978, to Benjamin Civiletti, who was then a Deputy Attorney General, in which Volz asked that Mary Cazalas be terminated. (P-58; D-87) She was denied a copy of this letter and obtained it only after filing her Freedom of Information Act complaint. See *Cazalas v. United States Department of Justice, et al,* 660 F.2d 161 (5th Cir., 1981).

Only by obtaining documents through a suit filed pursuant to the FOIA and Privacy Acts was Mary Williams Cazalas ever able to learn all the reasons given by Volz to the United States Department of Justice in Washington, D. C., for her termination. She was terminated without knowing the reasons for her termination and without being afforded an opportunity to answer and rebut the allegations against her, which is in violation of due process of law guaranteed to her by the Fifth Amendment to the Constitution of the United States. (Tr. 211; R-1012-1106; Deposition of Dan Gluck, R-472)

Mary Eastwood, the EEO officer in the United States Department of Justice in Washington, D. C., wrote a memorandum dated February 15, 1979, in which she recommended to Benjamin Civiletti that before making a decision to remove Plaintiff-Petitioner his office furnish her with specific reasons for removal and afford her a reasonable time to respond to the charges in writing to Civiletti. (R-472; Brief Appendix E) Ms. Eastwood pointed out that competitive employees and veterans have a right to at least thirty days advance written notice of removal and at least seven days to respond orally or in writing. She cited 5 U.S.C.

Sections 7511-7514 and noted that all but a few female attorneys are nonveterans subject to removal without procedural rights. Plaintiff-Petitioner, as a nonveteran, excepted service employee, had no procedural rights other than to receive a letter of termination prior to the effective date of termination with a brief statement of the reasons therefor under Department of Justice Order 1752.1 Ch. 6, Paragraph 21(b). (R-468, 469, 470; Appendix F)

The denial of due process resulting from the application of this order was noted by David Morman, the counselor assigned to conciliate this matter in November of 1978. The memorandum of Mary Eastwood, Department of Justice Order 1752.1, the memorandum of William P. Tyson (Appendix G) to Benjamin Civiletti and David Morman's handwritten notes were obtained only through filing of the complaint under the FOIA and Privacy Act provisions. Plaintiff-Petitioner may have never known of the existence of these documents without filing this FOIA-Privacy Act complaint. She was denied any right to due process through the Merit System Protection Board by Department of Justice Order 1752.1. (R-475) The EEO investigator was denied the right to inform Mary Cazalas of the reasons Volz wanted her terminated as stated by Saporito in his EEO Investigation Report at Exhibit 32. (R–466)

On March 7, 1979, Plaintiff-Petitioner met with William Tyson, Acting Director of the Executive Office for United States Attorneys. She requested that she be given notice of the charges against her and a right to respond. She asked that her termination be delayed until after completion of the investigation of her EEO complaint alleging sex discrimination. She was not told the charges against her nor was she given an opportunity to rebut them. She had not received the documents requested by her pursuant to the

FOIA and Privacy Act. Tyson told Petitioner that he knew very little about her case, but there was no reason for his not knowing since this was within the ambit of his responsibility and Volz had sent the letter of December 29, 1978, addressed to Civiletti to Tyson with a cover letter dated December 29, 1978. (R-1014-1022) Plaintiff-Petitioner did prove to Tyson that allegations made by Volz at harassment sessions were false. Tyson presented no information to counter her rebuttal. Tyson stated in his recommendation that he had spoken with Volz who advised that she should be terminated without waiting for completion of the EEO investigation because her presence in the office was detrimental to office morale. This allegation by Volz had no foundation in fact. Tyson recommended to Civiletti that she be terminated. He stated that she could pursue whatever action she chooses. (Tr. 262-264; R-477) Tyson and Civiletti rejected Mary Eastwood's recommendation and she was removed from her position as Assistant United States Attorney without her knowing why and without an opportunity to answer and rebut the false allegations in deprivation of her liberty and property without due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States of America. No investigation was ever made by Tyson or Civiletti prior to her termination. Volz's false allegations were accepted as gospel. (R-1011-1012; Tr. 262-266; Deposition of Dan Gluck at Tr. 66-84)

On or about April 4, 1979, Volz gave to Plaintiff-Petitioner the letter advising her that she was to be terminated as of April 20, 1979, which was signed by Benjamin Civiletti. (P-53Q; R-1052) The reasons given were not specific. (Tr. 152-176; 845; 879, 663-665; P-53A R; Appendix H)

After giving her the letter notifying her of her termination, John Volz threatened to sue her for libel and slander if she continued with her EEO complaint. In so doing, the United

States Attorney, John Volz, was again violating the provisions of Title VII of the Civil Rights Act of 1964, as amended. Section 704(a) of that Act prohibits retaliation for exercising one's rights under the Act. The statement was taped by Mary Cazalas without Volz's knowledge. (Tr. 279-291; P-35)

REASONS THE WRIT OF CERTIORARI SHOULD BE GRANTED

1. THE DEFENDANTS DISCRIMINATED AGAINST MARY WILLIAMS CAZALAS ON THE BASIS OF SEX IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. SECTION 2000e—*et seq.*

The great weight given to findings of fact of the district court should not be followed in this case because the trial court had no opportunity to observe the witnesses, to hear the evidence and to determine the credibility of the witnesses. The trial judge, Honorable Jack M. Gordon, who heard this case died before he rendered judgment. It was agreed among the parties that this case would be decided on the record by Judge Henry A. Mentz, who was appointed to Section I to replace Judge Gordon. The opinion of Judge Mentz is clearly erroneous, for the reasons stated in Petitioner's brief and for the reasons which are contained in the testimony of Mary Cazalas' witnesses, which is too voluminous to even comment on within the pages of her brief, and in this Petition. The report of Ray Saporito which Judge Mentz gave great weight to, lacked credibility in the opinion of Judge Gordon and he did not intend to refer to it. (Tr. 1523-1524; 1724-1725) Mary Eastwood testified that the EEO reports should not be used to discharge an employee. (Tr. 42-47, 21-25)

Judge Mentz stated that John Volz conferred on a consistent basis with the United States Attorney's Office supervisory staff regarding Mary Williams Cazalas and apprised the proper officials at the United States Department of Justice as to the situation. He notes that these officials responded in a monitoring capacity. The affidavit of Elaine Chauvin given to Ray Saporito is that Mr. Volz's Chief of the Civil Division, Michaelle Pitard Wynne, told Elaine Chauvin that:

> "When Ms. Pitard resigned from the staff of the U.S. Attorney in May, 1977, prior to leaving the office her last day here, she came into my office and stood behind a chair in front of my desk, lowered her head and proceeded to tell me that she knew she had lied about many people while she was an Assistant U.S. Attorney in order to foster her own ambitious desires. She continued on by saying she had done many things and said many things that she knew caused other people in the office undue problems and 'at times' felt a little sorry for what she did, but 'make no mistake about it', she urged, 'that's not saying I would not do it again if I had the chance or the opportunity.' " (D-137, Chauvin affidavit)

Benjamin R. Civiletti in his affidavit has stated that he made no investigation of allegations made by John Volz. (R. 1011-1106.)

The policy of the United States Department of Justice to deny excepted service employees the specifics of why they are to be terminated is plainly stated by Dan Gluck. See Gluck's testimony at p. 67, In. 18-22; p. 68, In. 1-22; p. 69,

In. 1-22; p. 70, In. 1-13.

It is Plaintiff's position that she has proved a prima facie case of sexual discrimination as required in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and the proof was not rebutted by the defendants. She has also proved she was retaliated against after filing her EEO complaint. See Schlei and Grossman, *Employment Discrimination Law*, 2d Ed., BNA, pp. 433-441 (1983).

2 PLAINTIFF WAS DENIED THE FIRST AMENDMENT GUARANTEE OF FREEDOM OF SPEECH.

In the letter of Benjamin Civiletti dated April 4, 1979, he stated as a reason for terminating Petitioner that she could not be trusted to maintain confidentiality of matters assigned to her. In Volz's letter of December 29, 1978, he falsely stated the facts pertaining to what Petitioner told Dr. Bruce Jarvis and the manner in which she handled the case. He criticized Petitioner for her advising Dr. Jarvis that he could have a problem in a suit filed against him for libel and slander by Dr. Margit Zoller based on the same facts alleged in three EEO cases against him in which she prevailed. (R-1525; Tr. 134-152) She had an ethical duty as an attorney to inform Jarvis of the weakness in his case and to be truthful with him. Plaintiff was denied freedom of speech in denying her the right to explain to Jarvis the weakness in his case.

Volz also denied Petitioner her right to freedom of speech in his letter to Civiletti on page 6 in which he accused her of "drawing a third party attorney into the discussion" pertaining to the ethical conduct of Assistant United States Attorneys and their duty to confess error when error exists and to be honest with the court. Her statements to Robert

Glass in the presence of Robert Boitman did not disclose confidential information about the United States Attorney's Office nor cases therein. (Tr. 821-831; P-17A, Glass' statement)

Volz also gave as a reason for terminating Plaintiff her criticism of Florence Quail and Susan Jarvis, attorneys with the HUD agency, who failed to obtain an affidavit that they had been told to have ready for Plaintiff to obtain that day for filing in the court. There is a public interest that Government work be performed in a meritorious manner. The United States Department of Justice was entitled to the cooperation of the HUD attorneys. (Tr. 100-102, 630-635)

On page 5 of Volz's letter of December 29, 1978, and in a teletype received by filing the FOIA suit, Plaintiff learned that Volz denied Plaintiff's right to freedom of speech in giving as a reason for her discharge the false allegation that she had libeled and slandered Judge Adrian Duplantier. Volz said that Plaintiff stated Judge Duplantier granted a judgment of acquittal because he was politically motivated. She had expressed her opinion to Magistrate Johannesen that he was prejudiced. The context in which this statement was made was certainly not disrespectful to the court or Judge Duplantier. (P-60; Tr. 217-221)

In the case of *Perry v. Sindermann*, 408 U.S. 593 (1972), the court reiterated that even though a person has no right to a valuable governmental benefit and even though the Government may deny the benefit for any number of reasons, there are some reasons upon which the Government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech. If the Government could deny a benefit to a person because of his con-

stitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the Government to "produce a result which it could not command directly". Such interference with constitutional rights is impermissible. The court cited a number of cases in which constitutional rights were held to have been denied impermissibly. The court has the task of seeking a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state as an employer, in promoting the efficiency of the public service it performs through its employees. A public criticism of superiors in matters of public concern may be constitutionally protected and constitute an impermissible basis for termination of employment. See also *Connick v. Myers*, U.S. Supreme Court No. 81-125, decided April 20, 1983; *Pickering v. Board of Education*, 191 U.S. 563, 568 (1968). See also *Brandi v. Finkel*, 445 U.S. 507, 63 L.Ed.2d 574 (1980); *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir., 1979); *Elrod v. Burns*, 427 U.S. 347 (1976); *Huffstutter v. Bergland*, 607 F.2d 1090 (5th Cir., 1979).

In *Porter v. Califano*, 592 F.2d 770 (5th Cir., 1979), the court stated that the First Amendment generally favors the market place testing of ideas and information rather than their arbitrary control by the Government. The Government itself, and especially its top officials, speak loudly in our society. Such volumn is tolerable in part because the Government does not speak in one voice. The First Amendment insures that in most circumstances even the most junior Government clerk typist can criticize the speech and acts of top officials in her office as freely as any citizen can. The court rejected the argument of the Government that permitting and then refuting each and every charge made by its employees will be inefficient and drain energies and resources. Although the market place of ideas may entail

such costs, the First Amendment generally eschews this short-cited view and is more concerned with the long-term gains of robust debate. To a point, and in certain circumstances, the First Amendment tolerates the chilling and punishing of employees' speech, but it is not far beyond that point, and in only slightly varied circumstances, that we risk the strangulation of the free market place of ideas by the monopolism of official control. The First Amendment protects the ventilation of the most noxious ideas unless and until the Government proves that the speech is so poisonous to Government operations that, on balance, it is necessary to choke off the pungent exhaltation of the sincere whistle-blower and suffer in the sadly thinner atmosphere that is left. The Government must show that the speech of the employees injures the Government and that the benefit of preventing the injuries actually outweighs the profound benefit of free speech in this society. In conducting the balancing test, and in considering the legitimacy of management's decision to punish and chill the employee's speech as opposed to tolerating and rebutting it, the court must consider all relevant facts and argument.

In *Barbra v. Garland Independent School District,* 474 F.Supp. 687, 696-697 (N.D. Texas, 1979), the court held that for the Government to constitutionally remove an employee from Government service for exercising the right of free speech, it is encumbent upon it to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in the employment. The defendants herein have not made such a showing.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court emphasized the public interest in having free and unhindered debate on matters of public importance. Statements of public officials are matters of public concern and must be accorded First Amendment protection despite the

fact that such statements are directed at their nominal superiors. Unless the balance favors the Government, the Government should not be permitted to punish an employee for truthful speech, or for false speech made without malice or reckless disregard of the truth. Establishing that a particular expression is protected by the First Amendment is not the only element needed to obtain relief. The Supreme Court requires a showing that the constitutionally protected conduct was a motivating or substantial factor in the termination of the employee. In Plaintiff's case, the unconstitutional denial of her right to freedom of speech was clearly a motivating factor.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). "(S)peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the court has frequently reaffirmed that speech on public issues occupies the "highest rung of the heirarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. There is an interest in this country that Government service should depend on meritorious performances. *CSC v. Letter Carriers*, 413 U.S. 548 (1973) and *United Public Works v. Mitchell*, 330 U.S. 75 (1947) There is also interest in the public that Government attorneys are honest with the court and the public and that they follow the Canons of

Ethics of the legal profession.

3. PLAINTIFF WAS DENIED THE FIFTH AMENDMENT GUARANTEE OF DUE PROCESS OF LAW

Plaintiff was denied due process of law in violation of the Fifth Amendment to the Constitution of the United States because she was terminated without being advised of the reasons therefor and without being afforded an opportunity to overcome the false allegations against her. The defendants contend that because Plaintiff was an excepted service employee she was not entitled to know the reasons for her discharge and that, under the Department of Justice Order 1752.1, she was merely entitled to a letter in which a brief statement of the reasons for her termination are stated and the effective date of termination is specified. They claim that this was done and therefore the United States Department of Justice has complied with its procedures for termination of an Assistant United States Attorney. It is Plaintiff's position that this order and procedure are unconstitutional because they violate due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. As applied to Plaintiff, she has been denied due process of law. The detailed chronology of events is stated in Plaintiff's Memorandum In Opposition To Defendants' Motion To Dismiss. (R-1517-1525)

The EEO investigation was not completed until after Plaintiff was fired and this suit was filed. The Personnel Office of the Equal Employment Opportunity Commission in Washington, D. C., had contacted the United States Department of Justice regarding Plaintiff's transfer to the Commission before John Volz gave to Plaintiff the letter of Civiletti on or about April 4, 1979. (Deposition of Elizabeth Doucet)

Plaintiff has had to state in response to questioning on her application for employment with the Commission that she was terminated from the United States Department of Justice and the reasons therefor. If Plaintiff had not been truthful in her statement, she would have been in violation of 18 U.S.C. Section 1001 which has a penalty of five years and/or $10,000.00 for making a false statement to the United States Government.

The provisions of 5 C.F.R. Section 294.702(c) state that the following information may be given to a prospective employer of a Government employee or former Government employee:

> "(1) Tenure of employment;
> (2) Civil service status;
> (3) Length of service in the agency and the Government; and
> (4) When separated, the date and reason for separation shown on the Notification of Personnel Action, Standard Form 50."

The reasons given on the "Notification of Personnel Action" form dated July 30, 1979, which was sent to Plaintiff states the following reason for her termination:

> "Position not covered by provisions of Fair Labor Standards Act. Your service to the Department of Justice has been appreciated."

This statement would cause any prospective employer to wonder what was the reason for Plaintiff's termination.

The United States Department of Justice Order 1752.1, Chapter 6 entitled Discipline and Removal of Excepted Service Employees states as follows:

> "This section requires that the letter provide a brief statement of the reasons for the termination and that it specify the effective date of the termination."

It is Plaintiff's position that this order should be declared unconstitutional because it deprives excepted service employees who are non-veterans without veterans' preference and civil service benefits of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. When the reason is false, the employee may be terminated without knowing the specific reason for discharge and without an opportunity to rebut false allegations. This places a stigma on the employee, and it serves to deny the employee's liberty interest and property right in future employment in the Government and private sectors. Present and future disclosures of false and damaging reasons for discharge may deprive the employee of such rights. The provisions of 5 C.F.R. Sections 294.702 and 294.703, 5 C.F.R. Section 297.504 make future disclose probable if an employee wishes to apply for a position with the Government.

An excepted service employee cannot be discharged for a reason that denies the employee constitutionally guaranteed rights such as freedom of speech or statutorily guaranteed rights such as freedom from sex discrimination in Title VII of the Civil Rights Act of 1964 as amended. The jurisprudence clearly supports Plaintiff's allegations of denial of freedom of speech, sex discrimination and due process of law. Plaintiff could be disbarred by the Louisiana State Bar Association because of the allegations of Volz in his letter of December 29, 1978.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court observed that in a Constitution for free people, there can be no doubt that the meaning of liberty must be broad indeed. The court recognized that a state may not refuse to employ an individual under such circumstances that the interest of liberty are implicated. Where a person's good name, reputation, honor or integrity is at stake because of what the Government is doing to the person, notice and an opportunity to be heard are essential, for to deprive one of not only present Government employment but also future opportunity is certainly no small injury. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1973); *Weiman v. Updegraff*, 344 U.S. 183, 191 (1952); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *United States v. Lovett*, 328 U.S. 303, 316-317 (1946); *Peters v. Hobby*, 349 U.S. 331, 352 (1955), Douglas, J. *concurring; Cafeteria Workers v. McElroy*, 367 U. S. 886, 898 (1961); *Bishop v. Wood*, 426 U.S. 341 (1976).

In *Gross v. Lopez*, 419 U.S. 565, 580 (1975), the court stated as follows:

> ". . . . Fairness can rarely be obtained by secret one-sided determination of facts decisive of rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." See *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J. concurring)

See also *Giordano v. Roudebush*, 448 F.Supp. 899 (S.D.

Iowa, 1977), *affirmed* 617 F.2d 511 (8th Cir., 1980).

4. JOHN VOLZ AND BENJAMIN R. CIVILETTI ARE PERSONALLY LIABLE TO MARY WILLIAMS CAZALAS FOR VIOLATION OF HER RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION.

Plaintiff has the right to, and did, sue John Volz and Benjamin Civiletti individually for their denial of Plaintiff's First and Fifth Amendment rights. They do not have absolute immunity in the factual situation involved in this case. They were not acting in the capacity of a prosecutor but rather as employers of the Plaintiff, and their immunity is only a qualified immunity.

Congress has not provided any other remedy to right the wrong caused Mary Williams Cazalas by Volz and Civiletti. She is an excepted service employee without veterans' preference benefits. She is not entitled to the protection provided under the Civil Service Reform Act.

In passing the Civil Service Reform Act of 1978, Congress recognized the need for protection of the federal employees who are whistle-blowers. See Section 2640. In Subchapter II, Section 7511(c), Congress enables federal agencies that wish to include excepted service employees within the protection of the Civil Service Reform Act to do so. That section reads as follows:

> "(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office."

The United States Department of Justice has chosen not to place excepted service employees in that agency under the

provisions of the Civil Service Reform Act of 1978. The Justice Department continues to follow the procedure set forth in United States Department of Justice Order 1752.1 which denies due process of law and equal protection of law to federal Government excepted service employees in violation of the Fifth Amendment to the Constitution of the United States. It serves to perpetuate the corruption of the political spoils system which did form the stimulus for establishment of the Civil Service System. See *Elrod v. Burns*, 427 U.S. 347 (1976) and *Brandi v. Finkel*, 445 U.S. 507, 63 L.Ed.2d 574 (1980). It is a denial of due process of law. See *Fowler v. United States*, 633 F.2d 1258 (8th Cir. 1980).

In *Bush v. Lucas*, Supreme Court No. 81-469, decided June 13, 1983, this Court stated that it has been established by its prior cases that the federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps by statutory remedy itself, the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.

In *Bush v. Lucas, supra.*, the federal employee was a civil service employee who had the benefit of an elaborate remedial system that had been constructed step by step, with careful attention to policy considerations, and the Court concluded that this remedy should not be augmented by the creation of a new judicial remedy for the constitutional violation at issue. Justice Marshall, with whom Justice

Blackmun concurred, agreed that there were special factors counselling hesitation in the absence of affirmative action by Congress. They cited *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971). However, they stated they were writing a concurring opinion to emphasize that in their view a different case would be presented if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights, and that affords a remedy that is substantially as effective as a damage action. The remedy in *Bush* was designed by Congress to put the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place. They noted that there is nothing in the decision of *Bush v. Lucas, supra.*, to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme. Mary Williams Cazalas and all other assistant United States attorneys who are in the excepted service without veterans preference are federal employees without a remedy under a federal statutory scheme for personnel actions that deprive them of their liberty.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 392-398 (1971), the court observed that when federally protected rights have been invaded, the courts will be alert to adjust their remedies so as to grant necessary relief. When legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. The very essence of civil liberty consists in the right of every individual to claim the protection of the law whenever he or she receives an injury. Federal officials who act outside their federal statutory authority will be held strictly liable for their trespassory acts.

An official is not excused from liability if he fails to observe obvious statutory and constitutional limitations on his powers or if his conduct is a manifestly erroneous application of the statute or palpably beyond his authority or if he has ignored the clear limitations on his enforcement authority. See *Butz v. Economou*, 438 U.S. 478, 489-505 (1977) and *Barr v. Mateo*, 360 U.S. 564 (1959).

In *Scheuer v. Rhodes*, 416 U.S. 232, 244-245 (1974), the Court stated that all individuals, whatever their position in Government, are subject to federal law. "*No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of government, from the highest to the lowest, are creatures of the law, and are bound to obey it.*" (Emphasis added) See *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Marbury v. Madison*, 1 Cranch 137 (1803). Volz and Civiletti were required to obey the law of the United States and not discriminate against Mary Williams Cazalas nor deny her Due Process of Law and Freedom of Speech.

Petitioner herein has no other remedy for the First and Fifth Amendment violations. These are not allegations of employment discrimination and the relief afforded is not the same as in a Title VII case. See *Davis v. Passman*, 442 U.S. 228 (1979) and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

CONCLUSION

For the foregoing reasons, Petitioner respectfully represents to this court that the judgment of the District Court which was affirmed by the Fifth Circuit Court of Appeals should be reversed and the case remanded for an award of damages, costs and attorney's fees to Petitioner. She also prays for

costs and attorney's fees for this petition for a writ of certiorari.

Respectfully Submitted,

Mary Williams Cazalas p.m.a.s.

Mary Williams Cazalas

Sylvia Roberts p.m.a.s.

CERTIFICATE OF SERVICE

I, MARY WILLIAMS CAZALAS, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on July 12, 1984, I served the foregoing petition for a writ of certiorari, and its appendices and exhibits, on the United States Department of Justice, Benjamin R. Civiletti and John Volz, by mailing three copies to Al Daniels, Appellate Civil Division United States Department of Justice, Washington, D. C., and by mailing three copies to Benjamin R. Civiletti, 1301 Pennsylvania Avenue, N.W., Suite 704, Washington, D. C., 20004, and by mailing three copies to John Volz, United States Attorney's Office, Hale Boggs Building, 500 Camp Street, New Orleans, Louisiana 70130, by certified mail, postage prepaid, receipt requested.

Mary Williams Cazalas

MARY WILLIAMS CAZALAS
In Proper Person

APPENDIX A

Mary Williams CAZALAS,
Plaintiff-Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE,
William French Smith, Attorney General of the
United States, et al.,
Defendant-Appellees.

No. 83-3246

United States Court of Appeals Fifth Circuit.

May 7, 1984.

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before RANDALL, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

The judgment of the district court is affirmed on the basis of its findings of fact and conclusions of law entered on April 15, 1983. *See* 569 F.Supp. 213 (E.D.La. 1983).

AFFIRMED.

APPENDIX B

Mary Williams CAZALAS

v.

UNITED STATES DEPARTMENT OF JUSTICE.

Civ. A. No. 80-761

United States District Court,
E. D. Louisiana.

April 15, 1983.

Plaintiff, former assistant United States Attorney, brought Title VII employment discrimination action, alleging that she had been unlawfully dismissed based upon her sex, further claiming that her free speech and due process rights had been violated and that her termination represented unlawful retaliation. The District Court, Mentz, J., held that: (1) evidence of plaintiff's insufficient work performance justified her termination and supported findings that her termination was not based on sexual discrimination or retaliation, and that there was no disparate treatment; (2) plaintiff could not maintain separate action against United States Attorney and Attorney General in their individual capacities seeking damages for employment discrimination and purported violations of her First and Fifth Amendment rights; and (3) United States Attorney's Office successfully negated any discriminatory animus in failing to promote and in terminating plaintiff, and further negated any claim of retaliation.

Judgment for defendants.

1. Civil Rights key 44(5)

In Title VII employment discrimination action, evidence of problems with female assistant United States Attorney's ability to function as advocate, supervisability, discretion and ability to maintain confidentiality, competency and professionalism, relations with client agencies, and adverse effect on efficiency of office, justified her termination from employment, and supported findings that termination was not based on sexual discrimination or retaliation for filing of Title VII claim, and that there was no disparate treatment. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

2. Constitutional Law key 72

It is without province of federal district court to pass judgment on rectitude of disciplinary or administrative procedures utilized in internal operation of United States Attorney's Office, to extent that they do not encompass unlawful discriminatory actions.

3. Civil Rights key 44(6)

In female assistant United States Attorney's Title VII employment discrimination action, evidence supported finding that there was no pattern or practice of sexual discrimination in United States Attorney's Office at time of female assistant attorney's termination.

4. Civil Rights key 38

Where dismissed female assistant United States Attorney had full access to and utilization of Title VII mechanisms in seeking redress for her claims of sexual discrimination in her

employment, she could not maintain separate employment discrimination claim against United States Attorney and Attorney General in their individual capacities for alleged conspiracy resulting in her dismissal. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

5. Civil Rights key 38

Where dismissed female assistant United States Attorney was subject to merit system principles of Civil Service Reform Act of 1978 and was entitled to avail herself of procedures therein to establish that her termination constituted prohibited personnel practice, she could not maintain separate claim seeking damages from United States Attorney and Attorney General alleging that she was terminated because of her engagement in activities protected by First Amendment and that she was not afforded hearing rights required by Fifth Amendment due process guarantee. U.S. C.A. Const. Amends. 1, 5; 5 U.S.C.A. §§1206(c)(1)(A), 2302(b)(11).

6. Civil Rights key 44(1)

In Title VII employment discrimination action, order of proof dictates that plaintiff bear burden of proving prima facie case of discrimination by preponderance of evidence, and upon plaintiff's establishment of prima facie case, burden shifts to defendant to articulate some legitimate nondiscriminatory reason for alleged discriminatory action; if defendant articulates such reason, plaintiff must be afforded opportunity to prove by preponderance of evidence that reasons advanced by defendant were in fact pretext for discrimination. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

7. Civil Rights key 44(1)

Prima facie case of employment discrimination under Title VII entails showing by plaintiff that he belongs to group protected by statute, he was qualified for job from which he was discharged, he was terminated, and, after termination, employer hired person not in plaintiff's protected class, or retained those having comparable or lesser qualifications not in plaintiff's protected class. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

8. Civil Rights key 44(1)

Prima facie showing of discrimination in Title VII employment discrimination action is not equated with factual finding of discrimination; it is, rather, proof of employer's actions from which inference of discriminatory animus is drawn. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

9. Civil Rights key 44(1)

In responding to plaintiff's prima facie showing of employment discrimination in Title VII action, defendant need only produce admissible evidence that would allow trier of fact rationally to conclude that employment decision had not been motivated by discriminatory animus; defendant's burden is framed as one of production rather than persuasion. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

10. Civil Rights key 43

In order to establish Title VII violation, plaintiff must demonstrate that sex discrimination served as significant

motivating factor in employment decision; violation cannot be based upon impermissible factor having played some part in employer's action. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

11. Civil Rights key 44(5)

Even assuming that dismissed female assistant United States Attorney established prima facie case of sexual discrimination, United States Attorney's Office, by presenting evidence of policies relative to operation of Office, structure and assignment of work force, and insufficiencies in plaintiff's performance, negated any discriminatory animus in decisions not to appoint plaintiff to supervisory position and to terminate plaintiff, and further negated claim that termination was in retaliation for filing of Title VII claim. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

12. Master and Servant key 40(3)

To establish prima facie case of retaliation by employer for finding of employment discrimination claim, plaintiff must prove that she participated in Title VII proceeding and that her participation was known to retaliator, that she suffered adverse employment treatment during or after participation, and that causal connection existed between adverse employment treatment and participation. Civil Rights Act of 1964, §704(a), as amended, 42 U.S.C.A. §2000e– 3(a).

13. Master and Servant key 40(1)

After plaintiff establishes prima facie case of employer retaliation for filing of Title VII employment discrimination claim, burden shifts to employer to articulate legitimate nondiscriminatory reason for alleged acts of reprisal; burden

then returns to plaintiff for chance to demonstrate that employer's reasons are mere pretext for discrimination taken in retaliation for participation in protected activities. Civil Rights Act of 1964, §704(a), as amended, 42 U.S.C.A. §2000e–3(a).

Sylvia Roberts, Baton Rouge, La., Mary Williams Cazalas, New Orleans, La., for plaintiff.

Barbara L. Gordon, Dept. of Justice, Washington, D. C., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MENTZ, District Judge.

Plaintiff, Mary Williams Cazalas, served as an Assistant United States Attorney in the Eastern District of Louisiana for eight years. On April 20, 1979, this employment was terminated and Mrs. Cazalas filed the instant lawsuit alleging that she had been unlawfully dismissed from the United States Department of Justice based upon her sex. She also claimed that her free speech and due process rights had been violated and that her termination represented an unlawful retaliation for her action in filing an Equal Employment Opportunity complaint. Plaintiff's causes of action were founded upon the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., Section 2000e *et seq.* (hereinafter referred to as "Title VII"), and the First and Fifth Amendments to the United States Constitution. Although she originally contended that she was damaged by the "libelous and slanderous allegations of John Volz and others," the plaintiff subsequently moved for voluntary dismissal of these claims. Named defendants in the original complaint included John Volz, United States Attorney for

the Eastern District of Louisiana; the United States Department of Justice; and former Attorney General Benjamin Civiletti, the Justice Departmental chief at the time of plaintiff's dismissal.[1]

On September 1, 1981, the Court permitted plaintiff's amendment to the complaint, the matter having been brought before the Court by the defendants' motion for a review of the Magistrate's February 6, 1981, order which granted the motion to amend. The amendments expanded the scope of potential liability by asserting claims based upon Title VII and the First and Fifth Amendments against John Volz and Benjamin Civiletti in their individual capacities. Plaintiff's requested relief included declaratory and injunctive relief, back pay, and compensatory and punitive damages.

Mrs. Cazalas contended that her termination was a result of a conspiracy by Benjamin Civiletti, John Volz, Albert Winters, Robert Boitmann, Michaelle Pitard, and others to discriminate against her because of her sex. The plaintiff alleged that she was treated disparately based upon her sex. She further contended that there existed a pattern and practice of sex discrimination in the United States Attorney's Office at the time of her termination and after her termination. The defendants, however, advanced the following reasons to substantiate the plaintiff's termination: a lack of discretion and good judgment, incompetence, unwillingness to function as an advocate for the government's clients, lack of supervisability, inability to maintain office con-

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1. **Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Attorney General William French Smith has been substituted for former Attorney General Benjamin Civiletti, insofar as plaintiff's claims against Civiletti in his official capacity are concerned.**

fidences, inability to get along with clients, and overstepping the boundaries of the position as an Assistant United States Attorney. Thus, the defendants contended that the plaintiff's termination was based upon legitimate, non-discriminatory reasons. The plaintiff, however, asserted that such reasons were a mere pretext for sexual discrimination.

The defendants substantiated their contentions with evidence relative to situations and events of the plaintiff's employment as an Assistant United States Attorney. These incidents, which precipitated a morass of witness testimony and documentary evidence, were initially related through Mr. Volz's December 29, 1978 letter to Mr. Civiletti that requested the plaintiff's termination. In its adjudication, the Court has focused on the seemingly most significant of the situations in which the plaintiff was involved, scrutinizing the underlying facts in light of each party's allegations. While impossible to re-create the totality of circumstances, the Court has considered and has based its conclusions on the detailed descriptions of the controverted incidents that were presented at trial. Thus, the findings below represent the result of the Court's analysis of the totality of events that led to the plaintiff's termination, with particular attention to those presented by Mr. Volz to Mr. Civiletti.

Prior to trial, defendants brought a motion for partial summary judgment seeking dismissal of the plaintiff's constitutional claims relative to employment discrimination brought against Messrs. Volz and Civiletti in their individual capacities. It was also requested that judgment be entered to bar the First and Fifth Amendment damage claims against the individual defendants, to dismiss plaintiff's retaliation claim, and to reject plaintiff's claims for punitive and compensatory damages. The motion was brought for oral argument on October 7, 1981; the Court declined to make the legal determinations presented by the summary judgment

motions prior to trial and reserved its ruling. This opinion shall thus incorporate all legal issues pertaining to Mrs. Cazalas' lawsuit as well as the factual findings.

As its adjudicative touchstone, the Court is mindful of the limitations inherent in attempting to recreate professional endeavors, daily incidents, and human relationships within the confines of federal rules and burdens of proof. The Court is equally cognizant that the nature of the instant lawsuit lends itself to the erroneous impression that the Court has assumed the task of judging individual merit.

The matter proceeded to trial before the late Judge Jack M. Gordon on October 19, 1981, and was completed on October 28, 1981. The Court allowed time for the completion of additional deposition testimony and took the matter under advisement on November 11, 1981. The case being under advisement at the time of Judge Gordon's death, the parties entered a stipulation dated July 20, 1982, to allow Judge Henry A. Mentz, Jr., to decide the case based upon the record established during the trial and in pretrial proceedings. Having reviewed the evidence, the memoranda of counsel, and the applicable law, the Court now enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Factual Findings Relative to the Reasons for Plaintiff's Termination

[1] Plaintiff Mary Williams Cazalas, a white female, assumed duties as an Assistant U.S. Attorney for the Eastern District of Louisiana on February 16, 1971, during the tenure of U.S. Attorney Gerald Gallinghouse. As a member of an executive agency, Mrs. Cazalas was an excepted civil

service employee. Her employment with the U.S. Department of Justice was terminated on April 20, 1979 and the plaintiff presently serves as a trial attorney at the Equal Employment Opportunity Commission.

2.

Plaintiff's lawsuit named the following defendants: the U.S. Department of Justice, an agency of the U.S. Government; Benjamin R. Civiletti, former U.S. Attorney General, who is sued in his individual capacity; John Volz, U.S. Attorney for the Eastern District of Louisiana, who is sued in his official and individual capacities; and William French Smith, U.S. Attorney General, who is sued in his official capacity only.

3.

The following narrative relates the proceedings relative to the plaintiff's departure from the U.S. Attorney's Office. The cumulative effect of problems relative to Mrs. Cazalas' performance as an Assistant U.S. Attorney led Mr. Volz to the conclusion, after numerous conferences with members of the supervisory staff of the U.S. Attorney's Office, that the plaintiff was not an asset to the office, Mr. Volz preceded his actions with discussions with the appropriate officials of the Justice Department in Washington, D. C., including William Tyson, the then Acting Director of the Executive Office of U.S. Attorneys.

On October 3, 1978, Mr. Volz advised Mrs. Cazalas to locate other employment and allowed her 90 days in which to comply with his request. Mr. Volz thus afforded the plaintiff an opportunity to gracefully leave the office before a formal request would be made seeking her removal; Mrs.

Cazalas was asked to provide a letter of resignation effective January 1, 1979. Mr. Volz advised the plaintiff that such action was necessitated by the numerous complaints the office had received with respect to her conduct and her representation of the government, as well as internal problems relating to her supervisability. On October 7, 1978, the plaintiff filed an informal Equal Employment Opportunity (hereinafter "EEO") complaint alleging discrimination based upon her sex. Mr. David Mormon was thereafter sent from the U.S. Department of Justice to conduct an informal investigation of the complaint. While noting that report that was prepared in his function as an EEO counselor represented no determination as to Mrs. Cazalas' competence, Mr. Mormon found no substantive support for her sex discrimination allegations.[2] Mr. Mormon explained to the plaintiff the employment prerogatives of the U. S. Attorney regarding exempt personnel. Prior to the completion of Mr. Mormon's counseling, Mrs. Cazalas, on November 9, 1978, filed a formal EEO complaint. Subsequently, the plaintiff's discrimination claim was investigated thoroughly by Mr. Ray Sapporito, an EEO investigator, who concluded that no discrimination against the plaintiff had occurred and that plaintiff was terminated for legitimate, non-discriminatory reasons.

The background for this lawsuit would not be complete without reviewing defendants' exhibit 137, which is an "Analysis of Investigative File and Recommended Findings in the Discrimination Complaint of Mary W. Cazalas,"

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2. The report is based upon meetings with Mrs. Cazalas and interviews with various individuals who had worked with the plaintiff, including Mr. Volz; Daniel Bent, then First Assistant U.S. Attorney; Al Winters, then Chief of the Criminal Division; and several judges in the Eastern District of the U.S. District Court and the Court of Appeals for the Fifth Circuit.

dated October 20, 1981. The report begins with some statistical data on the employment ratio of women and men attorneys in the Eastern District of Louisiana, and the Department of Justice. In the Eastern District of Louisiana, on 4-1-78 there were 25% women attorneys; on 10-1-78 there were 21.1% women attorneys; and on 4-1-79 there were 26.1% women attorneys. By comparison the entire Department of Justice as of 12-31-78 had 18.1% attorneys and the Offices of U.S. Attorney had 17.3% women attorneys. The finding was as follows: "The proportion of women attorneys employed in the Eastern District of Louisiana including each of its two components exceeded those of the Department of Justice in all Offices of U.S. Attorney during the same period."

Next, there was statistical data comparing the salaries of the men and women. The finding here was: "The salaries and equivalent grade levels for women attorneys employed in the Eastern District of Louisiana are consistently higher than those for men. The salaries and equivalent grade levels for women in the Eastern District of Louisiana are also higher than those for Department of Justice attorneys and all of the Offices of U.S. Attorney."

In arriving at the conclusion that there had been no discrimination on each of the twelve allegations made by Mrs. Cazalas, the summary and conclusion was as follows:

Throughout the analysis, much weight was given to the affidavit of Mr. G. J. Gallinghouse because of the position he held as U.S. Attorney and the intimate view it gave him of many of the events and persons involved in Mrs. Cazalas' complaint. Furthermore, Mr. Gallinghouse was not named as an alleged discriminatory official, and his present position outside the U.S. Attorney's Office and the Department

of Justice suggests that he has little reason to be other than candid. Mr. Gallinghouse's comments consistently reiterate those of other supervisors and managers that Mrs. Cazalas was a disruptive influence, very difficult to supervise and a liability to the office.

Because Mrs. Cazalas indicated that she did not intend to resign, Mr. Volz felt compelled to terminate the employment, having again discussed the matter with the supervisory staff at the U.S. Attorney's Office. The Court gives great credence to Mr. Volz's testimony that sex was absolutely not a factor in his decision. These series of events precipitated Mr. Volz's December 29, 1978 letter to Mr. Civiletti in which he detailed his reasons for plaintiff's employment termination. Such communication, which related several of the unpropitious situations in which Mrs. Cazalas had been involved, also stressed their resulting discordant effect among the participants from the U.S. Attorney's Office, members of the judiciary, and those involved clients. On March 22, 1979, William Tyson wrote a memorandum to Benjamin Civiletti recommending that he terminate Mrs. Cazalas. Mr. Civiletti's April 4, 1979 letter notified the plaintiff of her termination effective April 20, 1979; Mr. Volz summoned Mrs. Cazalas to his office on April 9, 1979 to inform her of the letter and its contents. Mr. Civiletti substantiated the plaintiff's removal with the information submitted by Mr. Volz, citing reasons of unsatisfactory performance and judgment, failure to submit to supervision, and breaches of confidentiality. Mrs. Cazalas filed an EEO complaint on April 21, 1979, alleging retaliation. On April 23, 1979, Mrs. Cazalas commenced work at the EEOC office in New Orleans, Louisiana.

The Court cannot find fault with the procedures employed to effect the plaintiff's termination of employment. Mr.

Volz conferred on a consistent basis with the U.S. Attorney's Office supervisory staff and attempts were made to communicate to Mrs. Cazalas the problems causing Mr. Volz to take such action. The proper officials at the U.S. Department of Justice were apprised of the situation and responded by acting in a monitoring capacity.

4.

The Court finds an incident that occurred during preparation of an appellate brief to be representative of the problems relating to Mrs. Cazalas' supervisability. Upon an examination of the facts surrounding this situation, the Court cannot find that the defendants acted in a discriminatory manner.

When Mr. Volz assumed office as U.S. Attorney, he altered the internal appellate procedures. Because of his belief that each staff assistant should bear the responsibility for the preparation of appeals resulting from litigation for which he or she was initially responsible, Mr. Volz implemented such practice and named Mr. Robert Boitmann as supervisor of appeals. Mrs. Cazalas had previously handled all appellate briefs in which the government was a party regardless of the attorney who had handled the case on the trial level. She was thus relieved of this responsibility. Mr. Boitmann circulated a memorandum that reflected the change in the appellate procedure and announced the new policy. That is, he initiated the requirement of submission of all appellate briefs for his review prior to filing them with the Court of Appeals.[3]

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3. The memorandum read as follows:

> In order to insure that proper administrative control is maintained, all documents relating to appeals are to be initially referred to myself or Mrs. Durel.
>
> Upon receipt of appellant's brief a due date

Despite the above-described instructions, Mrs. Cazalas filed a brief in which she confessed error on the part of the government without having first submitted the brief to Mr. Boitmann. The case had been decided in the government's favor by the district court. Since the plaintiff had received the memorandum communicating the change in procedure as well as personal instructions from Mr. Boitmann regarding the submission date of the brief in question, the Court can find no basis that would substantiate the plaintiff's perception of her exemption from the appellate practices. The plaintiff's failure to follow office procedure in this instance indicates the resultant problems relating to her supervisability.

The above-described incident was aggravated by an instance which the Court must characterize as improper conduct—a characterization asserted by the defendants with which the Court must agree. After the discussion between Mr. Boitmann and the plaintiff that ensued following this controversy, Mrs. Cazalas asked a third party attorney his opinion on the confession of error tactic.[4] Mr. Boitmann

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3. Continued

will be given the AUSA assigned the appeal to submit a draft of the proposed brief to me. There will be no exceptions or extensions of the due date. The draft will then be reviewed by me and returned to the AUSA in sufficient time for final typing and submission to the Fifth Circuit.

I will be available at all times and at any stage during the appeal process to provide whatever assistance is necessary for the preparation of the brief or oral argument. Please do not hesitate to ask me questions however small and insignificant they may seem.

4. Mrs. Cazalas and this third party attorney had participated together in another case wherein error had been conceded.

testified that he was startled by the appearance of the request on a passer-by for an advisory opinion on internal office policy, and related his impression of the futility of his prior conversation with the plaintiff.

The subsequent discussion between Mr. Volz and Mrs. Cazalas concerning the incident illustrates the problem that Mr. Volz described as the plaintiff's ineffective advocacy. That is, when Mr. Volz suggested that the government's tenable position obviated any need for a confession of error, Mrs. Cazalas informed him that she would not make an argument when she personally felt that the court should rule otherwise. Mrs. Cazalas viewed proceeding with a position with which she disagreed personally as equivalent with impropriety. The Court notes that misrepresentation was not here in issue. The Court must find that such attitude manifested by Mrs. Cazalas did legitimately cause consternation over her ability to function as an advocate.

5.

The level of competency at which Mrs. Cazalas performed was called into question during her management of a suit against the Veterans Administration. After reviewing the testimony and documentary evidence surrounding this incident, the Court cannot find that the plaintiff's claim of sexual discrimination can be bolstered by this situation. In this case, a female physician employed at the Veterans Administration Hospital sued the doctor who served as medical director, and others, claiming sexual discrimination. While the defendant doctor was convinced of the strength of the case, Mrs. Cazalas, his assigned attorney, took an alternate position and advised him that the case presented serious weaknesses, being doubtful of success for the government. The Court is thus in accordance with the defendant

doctor's displeasure over the attitude displayed by Mrs. Cazalas with regards to her representation, it appearing that she persisted in warnings concerning the gravity of the defendant doctor's position. The situation was perceived sufficiently troublesome by the defendant doctor's wife to warrant consideration of engaging private counsel.

The Court has also considered reports of the medical director and his wife that Mrs. Cazalas spoke to them regarding matters in another case that they considered strictly confidential. The specification of these individuals involved by name substantiates to the Court the defendants' concern over Mrs. Cazalas' discretion and ability to maintain confidentiality.

6.

Judge Alvin B. Rubin of the Fifth Circuit Court of Appeals testified that he had been appointed to that position in October of 1977, having previously been a United States District Judge from 1966 until his appointment as Circuit Judge. He recalled, in the case of *United States v. Boulet,* stating to Mrs. Cazalas that he did not think her brief was very helpful, and noted the lack of quality in the brief, and thought "It was the duty of counsel for the government to do a somewhat better job." T–852. Judge Rubin stated that only two or three times in the course of his four years, and 500 oral argument cases, did he have occasion to caution an attorney, as the brief was "singularly bad." When asked whether the other attorneys criticized were also women, he stated that to the best of his memory, "All the others were male." He later told the U.S. Attorney, Mr. Volz, that he felt the "U.S. Attorney's Office would serve itself better if they had better briefs." T–853. Again, at page 859, Judge Rubin stated that "I do recall feeling that a brief for

the Government in the *Schilleci* case was markedly inadequate." In questioning Judge Rubin, Mrs. Cazalas argued that this particular brief had been written, for the most part, by Neil Heusel and John Musser. As to his statements to Mr. Mormon as contained in Exhibit P-17A, he stated "I do not think that these are unrepresentative of my opinion at the time." Commenting on the brief filed in *United States v. Schilleci*, Judge Rubin stated "I thought it was not a good defense of the (jury) charge, or the conduct of the trial." At page 868, Judge Rubin stated that he had on one occasion, commended Mrs. Cazalas. At page 869, Judge Rubin explained that his opinion of Mrs. Cazalas was not based solely on her performance in the *U.S. v. Boulet* case but was based upon "my total observation of your conduct as a lawyer before me as a District Judge and an Appellate Judge." Again, at page 872, he testified that he recalled reading two of Mrs. Cazalas' briefs, and "I thought that they were both bad, yes, 100%." He added "I think that what I said was that you tried hard and you suffered from a lack of judgment. And I think I still have that opinion, based on your total conduct before me."

After reviewing the details of a case in which Mrs. Cazalas represented the Department of Health, Education and Welfare (hereinafter "HEW"), the Court finds that the case was not handled in the most expeditious and professional manner. The situation serves to point out the disturbing aspects of Mrs. Cazalas' performance as an Assistant U.S. Attorney. The plaintiff in the HEW litigation sought to recover for the alleged wrongful death of her husband who had died after participation in a methadone treatment program. The U.S. Attorney who initially was assigned the case made little progress in the matter; when the case was reassigned to another Assistant U.S. Attorney, Mrs. Cazalas' assistance was requested.

The U.S. Attorneys had been requested repeatedly to file a motion to dismiss based upon a dispositive U.S. Supreme Court case; the Department of Justice had provided all pertinent authority and materials to aid motion preparation. Notwithstanding consideration of the initial inactivity in the matter, which cannot be attributed to the plaintiff, it is clear that Mrs. Cazalas unduly delayed in preparing the suggested motion. Although Mrs. Cazalas assured the supervisory Washington official over a five-month period that preparation of the motion was underway and that discovery would thus be obviated, the Washington office received a frantic phone call from Mrs. Cazalas regarding an impending discovery deadline. The supervisory Washington staff, again advising that the Supreme Court case would dispose of the HEW litigation, concluded that Mrs. Cazalas' nursing background and attendant personal interest in the substantive aspects of the case overrode her resolve to prevail in favor of her client.

The Court places significance on both the defendants' immediate concerns stemming from this incident—the unnecessary expense undertaken and potential damage to the ultimate disposition of the case—and on its reflection on Mrs. Cazalas' performance as an advocate. The situation thus factors into the Court's analysis of substantiation of the plaintiff's termination presented by the defendants.

7.

The Court finds Mrs. Cazalas' conduct during an incident involving the Department of Housing and Urban Development (hereinafter "HUD") again, representative of problems relating to her discretion, supervisability, and relations with client agencies. A misunderstanding arose concerning the necessity and availability of the proper HUD official for

execution of an affidavit. While present at the HUD offices, attempting to execute the affidavit, Mrs. Cazalas made several derogatory remarks about the quality and efficiency of the New Orleans HUD legal staff.

Notwithstanding the friction generated between the individuals and the government agencies involved, the plaintiff's inability to contain her frustration reflects detrimentally on the execution of her work. Moreover, the immediate outburst and the resulting complaint registered by Mrs. Cazalas to the Dallas Office of Regional Counsel represent an overstep of her authority owing to her failure to have previously cleared the complaint with Mr. Volz.

8.

In a case involving the Department of Health, Education and Welfare, a supervisory female Assistant U.S. Attorney instructed Mrs. Cazalas to argue a motion to request authorization to certify a controlling legal issue to the Court of Appeals. Mrs. Cazalas disagreed with another female staff attorney over the advisability of lodging an interlocutory appeal and explained her reasons against proceeding in such fashion. Resultant of the discussion, Mrs. Cazalas told others that she had been directed to "lie to the courts" or to "snow the presiding judge." The controversy centered on the meaning of the pertinent statute; Mrs. Cazalas advised that she disagreed with the interpretation of the statute which was in favor of the United States and that she agreed with a contrary interpretation. The female staff attorney informed Mrs. Cazalas that the plaintiff's personal belief was of no consequence.

The Court has reviewed the subsequent proceedings of the matter, the situation being complicated by conflicting

instructions and by intervention of Washington officials. The significance of the incident, however, lies in the support it lends to the defendants' contentions regarding the plaintiff's supervisability and her indiscretion in making such slanderous statements. Moreover, the disagreement between the plaintiff and the female staff attorney is again indicative of the complaints relative to the plaintiff's intransigent personal views and their deleterious affect on her advocacy skills.

9.

Problems with Mrs. Cazalas' conduct as an Assistant U.S. Attorney persisted despite her placement in the Criminal Division–a transfer intended to alleviate troublesome situations. The Court finds significance in these continued disruptive incidents and in their bearing upon the defendants' perceived need to terminate the plaintiff's employment. Furthermore, analysis of the defendants' actions when viewed as a response to situations foisted upon them yields the finding that sexual discrimination must be excluded as a dynamic in the employment relationship.

When Mrs. Cazalas tried a case involving an illegal importation charge, the presiding federal judge entered judgment against the government prior to submitting the case to the jury. Thereafter, while speaking to a federal magistrate, Mrs. Cazalas commented disparagingly concerning the judge's actions, stating that the judge was influenced politically. When Mr. Volz subsequently requested of Mrs. Cazalas an explanation for her statement, the plaintiff responded only that the remark reflected her opinion.

Based upon his perception of the seriousness of this incident, Mr. Volz sent a telex to Mr. Tyson requesting the plaintiff's suspension. The U. S. Department of Justice

refused, however, to utilize the limited suspension procedures; the department either terminated employment or took no action. The Court is in accordance with the defendants' perception of Mrs. Cazalas' conduct, finding that it did indeed illustrate a lack of good judgment and discretion.

10.

The plaintiff's additional assignments in the Criminal Division encompassed work relative to the copyright docket. Much controversy was created by a letter written by Mrs. Cazalas to copyright violators informing them that their continued violation of the copyright would be a criminal offense and thus prosecuted by the U.S. Attorney's Office. The letter was written subsequent to a discussion the plaintiff had had with special agents of the Federal Bureau of Investigation. In that discussion, Mrs. Cazalas had advised that individuals involved in activities violative of the copyright statute should be first placed on notice of their transgression and the resultant threat of federal prosecution. While conflict exists regarding clearance by the appropriate supervisory official of these statements as well as to the plaintiff's intention to issue what was considered a policy statement, the fact that Mrs. Cazalas presented such position, in itself, created internal office conflict and misunderstandings between the U.S. Attorney's Office and the F.B.I. agents.

A review of the facts attendant to this incident has fortified the Court's appreciation of Mr. Volz's difficulties in communicating effectively with the plaintiff. Her insistence upon taking notes of the discussion between Mr. Volz and herself relative to this matter, notwithstanding a secretary's presence to record the proceedings, and her seeming inability to understand or to verbalize the meaning of a statement of

policy from the U.S. Attorney's Office illustrate the frustration and problems Mr. Volz experienced in supervising the plaintiff. The adverse effect on the efficiency of office operations caused by situations as that above-described is evident.

II. Facts Relative to the Plaintiff's Disparate Treatment Claim

The Court must find that the plaintiff's complaints regarding the alleged disparate treatment accorded her by the defendants are not representative of sexual discrimination; rather, the defendants' actions have been justified and explained by the reasons advanced in response to the plaintiff's allegations. A review of the plaintiff's claims of disparate treatment has yielded the following representative findings.

1.

Mrs. Cazalas' extra-curricular activities included participation in the Federal Women's Program, the Federal Executive Board, the Federal Business Association, and the Federal Bar Association. Mr. Gallinghouse testified that he had considered these interests laudable and had encouraged the plaintiff's efforts provided no interference with her official duties resulted. Mrs. Cazalas' involvement required time commitments in excess of those relative to other staff attorneys. Testimony revealed that the plaintiff's activities caused unexplained absences from the office. Any criticism resulting from participation in these activities cannot constitute disparate treatment based upon sex.

2.

While Mrs. Cazalas objected to the name of the trial attorney being placed on the appellate brief which she had prepared, Mr. Gallinghouse explained that such practice illustrated the importance of the trial attorney's involvement in the litigation. Mr. Gallinghouse attached significance to appellate court awareness of the identity of the attorney who had tried the case. The plaintiff's superiors at the U.S. Attorney's Office had impressed upon her the necessity of collaborating with the trial attorney in writing the appellate brief, especially in formulation of the facts. Mr. Gallinghouse related that the office had experienced several problems due to the plaintiff's failure, on occasion, to confer with the trial attorney.

The Court finds that the placement of the trial attorney's name on an appellate brief written by the plaintiff was an expression of office policy—an exercise of the prerogative of the U.S. Attorney. The practice represented no attempt to treat the plaintiff in a disparate manner.

3.

Neither can the Court find any disparate treatment accorded the plaintiff on the basis of her sex by the nominal reference to her as Chief of the Appellate Section by former U.S. Attorney Gallinghouse without a formal designation as Chief. Regarding internal office structure, Mr. Gallinghouse testified as to the maintenance of three paid supervisory positions, these being determined by the U.S. Department of Justice and including: Chief of the Criminal Division, Chief of the Civil Division, and First Assistant U.S. Attorney. The title of Chief of the Appellate Section was given to Mrs. Cazalas as an internal reference only, there being no such official position.

4.

The appointment of Robert Boitmann as Supervisor of Appeals for the U.S. Attorney's Office cannot be equated with disparate treatment toward the plaintiff. Mr. Volz explained the rationale in changing the internal appellate procedure, stating that he transferred responsibilities to Mr. Boitmann based upon Boitmann's skills as a professional and as an advocate. Rather than entailing appellate brief writing, Boitmann's duties involved monitoring brief preparation to insure timely filing and a quality work product. Mr. Boitmann testified that the appellate job carried no salary increase, no change in administrative grade, nor parking privileges.

5.

Mrs. Cazalas contended that Mr. Volz summoned her to his office on several occasions and conducted "harassment sessions" in the presence of her superiors. Mr. Volz testified, however, that he approached these meetings with mediating intentions. That is, with no purpose to harass, Mr. Volz attempted to counsel the plaintiff with regard to several troublesome situations.

[2] The Court is unable to view the controversial incidents in a vacuum, the equitable outlook demanding, in hindsight, cognizance of the immediacy of a matter and the human reaction provoked thereby. It must also be noted that it is without the province of the Court to pass judgment on the rectitude of disciplinary or administrative procedures utilized in the internal operation of the U.S. Attorney's Office, to the extent that they do not encompass unlawful discriminatory action.

III. Findings Relative to the Existence of a Pattern or Practice of Sexual Discrimination

[3] Mrs. Cazalas claimed that there existed a pattern or practice of sexual discrimination in the U.S. Attorney's Office at the time of her termination and after her termination, such contention allegedly constituting circumstantial evidence that the plaintiff had been the victim of disparate treatment. The evidence fails to demonstrate, however, any pattern or practice of discrimination based upon sex effectuated during the tenue of either Mr. Gallinghouse or Mr. Volz.

Mr. Gallinghouse related that during his tenure no policy existed that would have prevented women from being hired in the criminal division. Indeed, Mr. Gallinghouse stated that he would have liked to have had a female in the criminal division, and had attempted to persuade Michaelle Pitard to join the criminal section. Mr. Gallinghouse had recommended the hiring of Kathleen Walsh Carland as a trial attorney in the criminal division; she was employed in this capacity for approximately two years. The Court accords weight to Mr. Gallinghouse's testimony that no sexual discrimination was visited upon Assistant U.S. Attorney Elaine Chauvin. Having considered Mrs. Chauvin for Chief of the Civil Division, Mr. Gallinghouse instead named Ms. Pitard.

When Mr. Volz assumed the position of U.S. Attorney on March 1, 1978, he named Richard T. Simmons, Jr. as Chief of the Civil Division to replace Ms. Pitard. Mr. Volz had supervised Mr. Simmons for four previous years at the Federal Public Defender's Office and was thoroughly aware of Mr. Simmons' qualifications and expertise as a trial advocate, which prompted him to make this change. Subsequently, Richard Simmons was appointed Chief of the Criminal Division and Ms. Pitard was renamed Chief of the Civil Division.

The above-described actions cannot be found to be tainted with sexual discrimination. Women did indeed serve in supervisory capacities in the U.S. Attorney's Office. In negating sexual discrimination as an operative force in the U.S. Attorney's Office, the Court is cognizant of the many considerations involved in personnel appointments and of the discretion vested with the U.S. Attorney.

IV. Factual Findings Relative to the Plaintiff's Retaliation Claim

The Court cannot find any factual support for Mrs. Cazalas' claim of retaliation. The alleged retaliatory action occurred on October 3, 1978, which is the date Mr. Volz informed the plaintiff that she would be terminated unless she voluntarily resigned. Mrs. Cazalas, however, did not file her administrative complaint until October 7, 1978. Thus, Mr. Volz could not have acted out of retaliation for the filing of the complaint.

CONCLUSIONS OF LAW

I.

Jurisdiction

The Court must initially consider the jurisdictional issues and their relation to the avenues on which the plaintiff is entitled to proceed for relief. Mrs. Cazalas seeks damages from Civiletti and Volz in their individual capacities in compensation for an alleged conspiracy that resulted in violation of her rights. The plaintiff contended that these gentlemen's role in her termination forms the basis for her claims of sexual discrimination and violations of both her First Amendment rights and the procedural protections guaranteed by

the due process clause of the Fifth Amendment. Thus, the alleged constitutional violations are grounded upon employment discrimination claims and non-employment discrimination claims.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971), the Supreme Court permitted a damage remedy to be implied directly from the Fourth Amendment. The victim of an unlawful search and seizure by federal agents was accorded the right to recover damages against the agent in federal court, despite the absence of any statute conferring such a right. The Supreme Court extended its theory to allow a damage remedy under the equal protection component of the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). Subsequently, the Supreme Court implied a damage remedy under the prohibition on cruel and unusual punishment of the Eighth Amendment. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). Restrictions, however, have been placed upon the *Bivens* cause of action; such limitations comprise the subject of the legal determination below.

A. *Redress for Claims of Sexual Discrimination in Federal Employment.*

[4] Section 717 of the Civil Rights Act of 1964, as added by §11 of the Equal Employment Act of 1972, 42 U.S.C. §2000e–16, proscribes federal employment discrimination and establishes an administrative and judicial enforcement system. Section 717(a) provides that personnel actions affecting federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. §2000e–16(a). Under section 717(b) and a subsequent reorganization plan, the Equal Employment

Opportunity Commission has been delegated enforcement authority of the anti-discrimination provisions of the Act, empowered to utilize "appropriate remedies, including reinstatement with or without back pay." *Id.*, §2000e–16(b),[5] Section 717(c) establishes the mechanisms for administrative relief, requiring their exhaustion prior to permitting an aggrieved employee to seek *de novo* review in district court. *Id.*, §2000e–16(c).

In *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), the Supreme Court examined the legislative history and the structure of the 1972 amendment to Title VII that extended its protections to federal employees. In consideration of a racial discrimination claim raised by a General Services Administration employee, the *Brown* court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The Court found that the "balance, completeness, and structural integrity of §717" were inconsistent with the contention that the Title VII remedy was intended to supplement other putative judicial relief. 425 U.S. at 832, 96 S.Ct. at 1968.

The Fifth Circuit in *Newbold v. United States Postal Service*, 614 F.2d 46 (5th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 878, 101 S.Ct. 225, 66 L.Ed.2d 101 (1980) refused to allow a suit for employment discrimination to proceed under 42 U.S.C. §1981, and followed the *Brown* pronunciation regarding the exclusivity of Title VII relief.

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5. The 1972 amendments to Title VII, extended the coverage of the statute to federal employees, the Civil Service Commission being charged with overseeing the administrative enforcement scheme. Pursuant to President Carter's Reorganization Plan No. 1 of 1978, 43 Fed.Reg. 19807 (May 9, 1978), all of the Civil Service Commission's Title VII administrative functions were transferred to the Equal Employment Opportunity Commission effective May 5, 1978.

The plaintiff had filed suit against the Postal Service, the American Postal Workers Union, the Equal Employment Opportunity Officer, and the attorneys with whom the plaintiff had consulted in pursuing his claim. Noting that *Brown* did not involve a union or individual defendant, the Fifth Circuit stated, "the *Brown* court's broad language on preemption and exclusivity suggests that there is no cause of action against individuals under §1981 *et seq.*" (citation omitted) 614 F.2d at 47. The *Brown* holding has thus established a progeny in adjudications of damage actions by federal employees against alleged discriminating officials in their personal capacities based on discrimination claims covered by Title VII. *See e.g., White v. General Services Administration*, 652 F.2d 913 (9th Cir. 1981), *Gissen v. Tackman*, 537 F.2d 784 (3d Cir. 1976) (per curiam) (en banc); *Neely v. Blumenthal*, 458 F.Supp. 945 (D.D.C.1978).[6] *See also Purtill v. Harris*, 658 F.2d 134 (3d Cir. 1981).

In *Carlson v. Green, supra,* the Supreme Court permitted an administratrix to maintain a constitutionally-based tort action against federal officials based on violations of her decedent's due process, equal protection, and Eighth Amendment rights. Despite the availability of a statutory remedy under the Federal Tort Claims Act (hereinafter "FTCA")

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6. The court in *Neely v. Blumenthal* embarked upon a comprehensive analysis of pertinent judicial authority, centering on the fact that in *Brown v. General Services Administration, supra,* the question of Title VII's preemptive effect on discrimination suits brought against individual officers for damages was not addressed. While offering emphatic assurances of maintaining avenues of relief against officials in their personal capacities, the *Neely* court did not, however, effectuate *Bivens* redress, concluding, "while the Supreme Court's decision in the *Brown* case provides no basis for extinguishing claims brought by federal employees against supervising officers in their individual capacities, neither does the *Bivens* decision afford a warrant for implying damage liability where Title VII applies." 458 F.Supp. at 960.

the Supreme Court accorded a *Bivens* remedy to the respondent. Integral to the decision was the premise that nothing in the FTCA indicated a Congressional intention to preempt a *Bivens* remedy or to negate an equally effective remedy for constitutional violations. The court footnoted this observation with the following explanation:

> [O]ur inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy. Where Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the *Bivens* remedy, . . . that congressional decision should be given effect by the courts." 446 U.S. at 19, 100 S.Ct. at 1472, n. 5.

The Court attached significance to instances where Congress had explicitly designated FTCA as an exclusive remedy and cited the pertinent statutory authority. Four additional factors indicative of the superior efficacy of the *Bivens* remedy when compared to the FTCA remedy supported the Court's conclusion that Congress did not intend to limit the *Carlson* respondent to FTCA redress. The Court could definitively proclaim that FTCA was an insufficient protector of the citizens' constitutional rights.

In *Brown v. General Services Administration, supra,* the Supreme Court extolled the comprehensive nature of the Title VII remedy, finding no congressional intention to utilize such statutory enforcement mechanisms in tandem with auxiliary relief. This Court accordingly follows the rationale intrinsic in the *Brown* decision and its progeny

in the disallowance of Mrs. Cazalas' employment discrimination claims asserted under the constitutional umbrella of protections and brought against Mr. Volz and Mr. Civiletti in their individual capacities. Mr. Justice Rehnquist poignantly expressed the philosophical underpinnings of these constructions in his dissent in *Carlson v. Green, supra,* a view shared by this Court.

> [T]he authority of federal courts to fashion remedies based on the "common law" of damages for constitutional violations likewise falls within the legislative domain, and does not exist where not conferred by Congress. 446 U.S. at 38, 100 S.Ct. at 1482.

Of pivotal importance to the *Davis v. Passman* allowance of a damage remedy based on the Fifth Amendment was the alternate plight of the petitioner had she not been accorded constitutional redress. With no effective means other than the judiciary to vindicate her rights, the *Davis* court found that a claim for relief was stated directly under the Constitution because "[f]or Davis, as for Bivens, 'it is damages or nothing.' " 442 U.S. at 245, 99 S.Ct. at 2277, citing *Bivens, supra,* 403 U.S. at 410, 91 S.Ct. at 2011 (Harlan, J., concurring in judgment).

The *Davis* court proceeded to note the absence of any explicit congressional declaration that would prohibit recovery of money damages and simultaneously recognized that as the plaintiff was not in the competitive service she could not avail herself of the remedial provisions of Title VII, §717. Of substantial precedential import is the *Davis* court's reliance on *Brown v. General Services Administration.* That is, following its observation relative to the plaintiff's status and the attendant limitations placed upon her avenues

for redress, the Supreme Court in *Davis* endorsed the *Brown* authority in its restatement of the *Brown* holding "that the remedies provided by §717 are exclusive when those federal employees covered by the statute seek to redress the violation of rights guaranteed by the statute." 442 U.S. at 247, 99 S.Ct. at 2278, n. 26.

Mrs. Cazalas utilized the Title VII mechanisms in seeking redress for her claims of sexual discrimination allegedly occurring during her employment with the U.S. Attorney's Office. With no basis on which to proceed against defendants Volz and Civiletti in their individual capacities seeking damages for such claims–and indeed with the controlling authority militating against such redress–the Court must dismiss the elements of the plaintiff's amended complaint demanding the aforesaid relief.

B. *Non-Discrimination Constitutional Claims.*

[5] Mrs. Cazalas contended that she was terminated because of her engagement in activities protected by the First Amendment and that she was not afforded the hearing rights required by the due process guarantee of the Fifth Amendment. In redress for such violations, the plaintiff seeks to proceed on a *Bivens* cause of action in requesting damages from Mr. Volz and Mr. Civiletti.

The plaintiff's right to maintain a constitutional tort action against the individual defendants must be examined in light of the Fifth Circuit's controlling decision in *Bush v. Lucas,* 647 F.2d 573 (5th Cir. 1981), *cert. granted,* ____ U.S. ____, 102 S.Ct. 3481, 73 L.Ed.2d 1365 (1982). In *Bush,* the plaintiff brought an action alleging defamation and retaliatory demotion against the director of the Marshall Space Flight Center. The district court rendered summary judgment in favor of the defendant. The Fifth Circuit held

that official immunity protected the director from liability for defamation and that the plaintiff has no cause of action for damages under the First Amendment for retaliatory demotion in view of remedies available under the Civil Service Commission. *Bush v. Lucas*, 598 F.2d 958 (5th Cir. 1979), *vacated and remanded*, 446 U.S. 914,100 S.Ct. 1846, 64 L.Ed.2d 268 (1980). The case was remanded for further consideration in light of *Carlson v. Green, supra.*

The Supreme Court in *Carlson* enunciated the two situations wherein an individual's right to recover damages against a federal official for constitutional violations can be defeated. With the absence of a statute conferring such right, courts must heed the following exceptions:

> The first is when the defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' [*Bivens*,] 403 U.S., at 396, 91 S.Ct., at 2004; *Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979). The second is when defendants show that Congress has provided an alternative remedy which is explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*, 403 U.S., at 397, 91 S.Ct., at 2005; *Davis v. Passman*, 442 U.S., at 245–247, 99 S.Ct., at 2277–2278.
>
> *Carlson v. Green*, 446 U.S. at 18, 100 S.Ct. at 1472.

The *Carlson* decision bore on the *Bush* court's earlier holding that the plaintiff could not seek damages for retaliatory damages. When reexamined under the *Carlson* directives,

the Fifth Circuit affirmed its earlier decision and held that special factors counseled hesitation precluding inference of a *Bivens* remedy. Central to the determination was the element of the "unique relationship between the Federal Government and its civil service employees." The court observed, "[t]he role of the government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally." 647 F.2d at 576. The distinction between the private and public employment contexts had been accorded significant import in earlier Supreme Court decisions. The Court in *Sampson v. Murray*, 415 U.S. 61, 83, 94 S.Ct. 937, 949, 39 L.Ed.2d 166 (1974) gave recognition to "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.' " quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). *See also, Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).[7]

Of particular relevance to the instant case was the *Bush* court's recognition of the bearing the special government employment relationship has on the procedures through which aggrieved public employees can assert and redress their rights in the employment context—in addition to its effect on employees' substantive rights "Consistent with the notion that the Government should have wide latitude and control over its employees, Congress, rather than the courts, has traditionally carried the burden of regulating the Govern-

---

7. Justice Powell's concurrence in *Arnett v. Kennedy* illustrates this precept of government employment. The court had held that a civil service employee had no due process right to a pretermination evidentiary hearing. Justice Powell, emphasizing the government's and the public interest in employee efficiency and discipline, stated that "[t]o this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." 416 U.S. at 168, 94 S.Ct. at 1651.

ment employer-employee relationship." 647 F.2d at 576. The Civil Service Reform Act of 1978 was enacted in execution of this Congressional action. The comprehensive scheme provided by the Civil Service Act thus reflects the congressional awareness of the responsibilities imposed by the government employment relationship.

In *Bivens* and *Carlson*, plaintiffs as private citizens sought damages from agents of the government acting in its sovereign capacity. It is that factor that served to distinguish the situation presented by the *Bush* plaintiff. The Fifth Circuit in *Bush* explained the underpinnings of its holding:

> The employer-employee context of this case serves to distinguish it from suits such as *Bivens* and *Carlson* which involved plaintiffs as private citizens seeking damages against agents of the Government acting in its sovereign capacity. Inferring a Bivens remedy in this case would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established. Ultimately, it would provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights. 647 F.2d at 577.

Thus, the *Bush* court declined to infer a *Bivens* remedy,

basing its rationale on the government employer-employee relationship which served as a special factor counseling hesitation in recognition of a constitutional cause of action in absence of congressional affirmative action.

Failure to infer a *Bivens* remedy did not leave the *Bush* plaintiff without redress. Neither will Mrs. Cazalas be situated without avenues for redress. While the specific procedures in *Bush* and the instant case differ by virtue of Mrs. Cazalas' status as an excepted service employee, the *Bush* court's holding stands paramount in the instant determination.

As a member of an executive agency, Mrs. Cazalas is subject to the Merit System Principles of the Civil Service Reform Act of 1978. The plaintiff, desiring to raise her constitutional claims against Mr. Civiletti and Mr. Volz, is thus entitled to avail herself of the procedures established by the statutory scheme. 5 U.S.C. §2301 *et seq.* As termination of any federal employee violative of constitutional rights constitutes a prohibited personnel practice under §2302(b)(11), an aggrieved employee may file claims with the Special Counsel of the Merit System Protection Board (hereinafter "MSPB"). The Special Counsel is thus empowered to conduct investigations of these claims and to recommend corrective action to the proper agency. *Id.* §1206(c)(1)(A). Upon the agency's failure to comply with the submitted recommendations, the Special Counsel may request the MSPB to consider the matter. The Board may order appropriate corrective action. *Id.* §1206(c)(1)(B).

The existence of the aforesaid statutory scheme and its relation to the considerations surrounding the availability of the plaintiff's right to assert constitutional claims seeking money damages must be evaluated in light of the *Bush* pronouncement. The above-quoted language of the *Bush*

court, indicative of its attitude within the confines of the *Bush* case *and* representative of the direction to be assumed in such future determinations, is thus equally applicable in the context of Mrs. Cazalas' claims. This Court being bound to follow and effectuate the theoretical basis it discerns operative in the *Bush* case, the plaintiff's constitutional non-discrimination claims against Mr. Volz and Mr. Civiletti must be dismissed. When confronted with statutory remedies, the very passage of which manifests a congressional intention to provide its own remedial scheme, the Court cannot maintain an alternate cause of action. Furthermore with no compelling reason to justify a transgression of the prevailing Supreme Court and Fifth Circuit directives nor of the established administrative relief, the Court finds that Mrs. Cazalas' status as a government employee serves as a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress.

II.

Title VII Adjudication

[6] A. Allocation of the burden of proof utilized in a Title VII case was delineated in *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The order of proof dictates that the plaintiff bear the burden of proving a prima facie case of discrimination by a preponderance of evidence. Upon the plaintiff's establishment of the prima facie case, the burden shifts to the defendant to "articulate some legitimate nondiscriminatory reason" for the alleged discriminatory action. 411 U.S. at 802, 93 S.Ct. at 1824. If the defendant articulates such reason, the plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the reasons advanced by the

defendant were in fact a pretext for discrimination.

[7, 8] The prima facie case entails a showing by the plaintiff that (i) [s]he belongs to a group protected by the statute; (ii) [s]he was qualified for the job from which [s]he was discharged; (iii) [s]he was terminated; and (iv) after the termination, the employer hired a person not in the plaintiff's protected class, or retained those having comparable or lesser qualifications, not in plaintiff's protected class. *Whiting v. Jackson State University*, 616 F.2d 116 (5th Cir. 1980). The prima facie showing under *McDonnell Douglas* is not equated with a factual finding of discrimination. It is, rather, proof of an employer's actions from which an inference of discriminatory animus is drawn. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

[9] Since the Supreme Court's decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the extent of the defendant employer's burden has been clarified.[8] In responding to the plaintiff's prima facie showing of employment discrimination, the defendant "need only produce admissible evidence that would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine v. Texas Department of Community Affairs*, 647 F.2d 513 (5th Cir. 1981) (on remand). The defendant's burden, then, is framed as one of production rather than persuasion.

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8. The Fifth Circuit in *Burdine v. Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979) had concluded that a rebuttal of the plaintiff's prima facie case required the employer to establish non-discriminatory reasons for the alleged discriminatory employment action by a preponderance of the evidence.

[10] If the employer successfully bears his burden of production, the presumption raised by the plaintiff's prima facie case is rebutted. In proceeding with the factual inquiry, the plaintiff is given the opportunity to demonstrate that the proffered reasons for the employment decision were not the true reasons. At this stage, the plaintiff's burden merges with her ultimate burden of persuading the Court that she has been victimized by intentional discrimination. "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. In order to establish a Title VII violation, the plaintiff must demonstrate that sex discrimination served as a significant motivating factor in the employment decision; a violation cannot be based upon an impermissible factor having played some part in the employer's action. *Whiting v. Jackson State University*, 616 F.2d at 121.

Since the advent of Title VII, a myriad of factual situations have been foisted upon the courts in efforts to seek judicial determinations of the parameters of legal employment practices. In the transformation of courtrooms into arenas for employer-employee confrontations, the judiciary has attempted to mediate conflicts and complaints, establishing a plethora of legal precedent awesome in quantity and in subject matter. While utilizing such guidelines and heeding the established standard of proof, the Court must note that its determination is premised upon an individual consideration of the facts, equities and intangibles peculiar to the instant case.

Representative of the judiciary's work in the Title VII area is the Fifth Circuit's decision in *Burdine v. Texas Department*

of Community Affairs, 647 F.2d 513 (5th Cir. 1981). On remand, the court affirmed the district court's finding that no discrimination was operative when the plaintiff had been terminated for the good of the agency. Similarly, the basis for termination in *Coleman v. Missouri Pacific Railroad Co.*, 622 F.2d 408 (8th Cir. 1980) could not be found to have been motivated by sexual bias. No Title VII violation could thus be established when the evidence substantiated the plaintiff's poor job performance and inability to handle assigned tasks. In *Cedeck v. Hamiltonian Federal Savings and Loan Association*, 551 F.2d 1136 (8th Cir. 1977), evidence portrayed the plaintiff's difficulties with the bank's computer system and in relations with fellow employees, in addition to a fair number of questionable absences. The court could not find that the defendant's failure to promote the plaintiff resulted from sexual discrimination.

[11] The Court herein pretermits the question of whether the plaintiff has established a prima facie case of sexual discrimination. The defendants have successfully carried their burden by the production of evidence which has negated any discriminatory animus as a motivating force in their employment decisions. The proof advanced by the defendants explanative of the plaintiff's termination, of the alterations and policies relative to the operation of the U.S. Attorney's Office, the structure and assignments of the work force, and of the unpleasant encounters among staff members, have demonstrated to the Court that the behavior and the interaction attendant to all such actions stemmed from legitimate, nondiscriminatory reasons. The defendants presented such reasons through the enlightening trial testimony of those involved individuals and through supportive documentary evidence; indeed, both sides submitted thorough and well-documented cases. The Court thus opines that the substantiation of the defendants' employment

decisions related in the above findings of fact represents an articulation of lawful reasons for the conduct challenged by the plaintiff. The Court deems unnecessary a particularization of the defendants' reasons and actions behind each described incident. Unable to demonstrate that the defendants' reasons were pretextual, the plaintiff cannot prevail in her Title VII claim.

While exhibiting no lack of sympathy for the course of events resulting in the plaintiff's termination from the U.S. Attorney's Office, the Court cannot accord legal redress in every unfortunate situation. Employment discord cannot be equated with intentional sexual discrimination. The Court must thus give credence to the employer, who, in the exercise of his discretion, terminates an employee who has been considered a hindrance to productivity.

B. The Court cannot find that the failure to appoint Mrs. Cazalas to a supervisory position in the U.S. Attorney's Office constituted sexual discrimination. Neither can it be found that Mr. Boitmann's placement as Supervisor of Appeals manifested disparate treatment. Mr. Volz explained his rationale for charging Mr. Boitmann with the appellate supervision. This positioning not discrediting Mrs. Cazalas' objective qualifications, the Court understands that subjective considerations attached to Mr. Volz's actions. Defendants have thus articulated reasons for various appointments; these explanations negate any utilization of a pattern or pratice of sexual discrimination. Ms. Pitard, while replaced as Chief of the Civil Section upon Mr. Volz's assumption of office, later resumed this position. The testimony revealed that after due consideration, it was deemed inappropriate to appoint Ms. Chauvin as Chief of the Civil Division.

> . . . Title VII does not obligate an employer to accord this preference. [to hire the minority or female applicant who has equal qualifications to the white male applicant] [T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. (citations omitted). *Texas Department of Community Affairs v. Burdine,* 450 U.S. at 259, 101 S.Ct. at 1097.

The defendants' reasons for various appointments cannot be characterized as pretextual, in light of their overriding interest in the efficiency and harmonious functioning of the U.S. Attorney's Office. The Court cannot find any basis on which to impose liability on the U.S. Attorney's Office or on the Department of Justice for the failure to hire more females or to appoint more females to supervisory positions. *See, Bauer v. Bailar,* 647 F.2d 1037 (10th Cir. 1981) (wherein the court, in considering an affirmative action program, found no legal requirement that an employer give preferential treatment to qualified minorities or women).

C. *Retaliation*

[12, 13] The plaintiff's additional claim is based upon the Title VII prohibition against any action an employer may take towards an employee in retaliation for his participation in an investigation, proceeding, or hearing relating to employment discrimination. 42 U.S.C. 2000e–3(a). In

order to prevail upon a claim of unlawful retaliation under §704(a), it is incumbent upon the plaintiff to initially establish a prima facie case. *McDonnell Douglas Corp. v. Green, supra.*[9] In presenting the prima facie case, the plaintiff must prove (1) that she participated in a Title VII proceeding and that her participation was known to the retaliator; (2) that she suffered adverse employment treatment during or after the participation; and (3) a causal connection between the adverse employment treatment and the participation. *Crawford v. Roadway Express, Inc.*, 485 F.Supp. 914 (W.D.La. 1980); *Grant v. Bethlehem Steel Corporation*, 622 F.2d 43 (2d Cir. 1980).

Mrs. Cazalas contended that she was terminated for filing an administrative complaint of employment discrimination. which contention constituted her retaliation claim. The plaintiff thus premised this claim upon the existence of a causal link between the filing of her administrative complaint and the decision to terminate her employment with the United States Attorney's Office.

Evidence presented during trial produced no alternate bases on which Mrs. Cazalas could or did charge unlawful retaliation. The Court must find, then, that the allegations of the plaintiff's complaint contradict the substance of her retaliation claim. That is, the plaintiff alleged that she filed her administrative complaint on October 7, 1978.

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9. The order of proof in a retaliation case follows the *McDonnell Douglas* rule. That is, after the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the alleged acts of reprisal. The burden then returns to the plaintiff for a chance to demonstrate that the employer's reasons are a mere pretext for discrimination taken in retaliation for participation in protected activities. *Grant v. Bethlehem Steel Corporation*, 622 F.2d 43, 46 (2d Cir. 1980).

Complaint IV, ¶ 1. She also alleged, however, that Mr. Volz informed her on October 3, 1978, that she would be terminated unless she voluntarily resigned. Hence, the notification by Mr. Volz four days *prior* to the filing of the EEO complaint presented a sequence of events that do not comport with the plaintiff's allegations. The absence of any evidentiary support for this contention demands that the Court dismiss Mrs. Cazalas' retaliation claim.

CONCLUSION

In accordance with the foregoing analysis, the Court concludes that the plaintiff failed to establish any violations of the provisions of Title VII. The Court further finds that the plaintiff is unable to maintain the claims brought under the First and Fifth Amendments to the U.S. Constitution; Mrs. Cazalas is precluded from asserting damage claims against Mr. Volz and Mr. Civiletti in their individual capacities.

IT IS THEREFORE ORDERED that JUDGMENT be entered in favor of the defendants, the U.S. Department of Justice, Benjamin R. Civiletti, John Volz, and William French Smith, and against the plaintiff, Mary Williams Cazalas, DISMISSING the plaintiff's suit with prejudice.

APPENDIX C

TEXT OF AMENDMENTS TO THE CONSTITUTION

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * *

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * *

§ 2000e–2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization–

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this action.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any

individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if–

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention

to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Business or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race,

color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by an labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub. L. 88–352, Title VII, §703, July 2, 1964, 78 Stat. 255; Pub. L. 92–261, §8(a), (b), Mar. 24, 1972, 86 Stat. 109.

§ 2000e–3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement preceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

§ 2000e–16. Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission; issuance of rules, regulations, etc. annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities

under this section. The Equal Employment Opportunity Commission shall–

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to–

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of

each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e–5 (f) through (k) of this title applicable to civil actions

(d) The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought thereunder.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

Pub.L. 88–352, Title VII, §717, as added Pub. L. 92–261, §11, Mar. 24, 1972, 86 Stat. 111, and amended 1978 Reorg. Plan No. 1, § 3, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub. L. 96–191, §8(g), Feb. 15, 1980, 94 Stat. 34.

APPENDIX D

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

MEMORANDUM

Dated: 12-18-70

TO: Mr. Philip H. Modlin, Director
Executive Office for U.S. Attorneys

FROM: Gerald J. Gallinghouse
United States Attorney
Eastern District of Louisiana

SUBJECT: Employment of Mrs. Mary R. Cazalas as an Assistant United States Attorney

We are recommending Mrs. Mary R. Cazalas for one of the new Assistant United States Attorney positions at an annual salary of $16,450, for these reasons:

1. She was graduated from law school more than three years ago, and has had three years of excellent legal experience.

2. We recommend her for the basic salary of $15,500, according to the guidelines in Mr. Wood's April 16, 1970 memorandum, plus the December 28, 1969 statutory 6% increase, bringing her annual salary to $16,450.

3. According to the guidelines, Mrs. Cazalas could possibly be eligible for the $16,200 base figure (now $17,150), because of her prior experience and academic achievements.

4. Mrs. Cazalas has authored several significant articles, and has earned and enjoys the respect of the legal community.

5. Most of her time since graduation from law school has been spent as a law clerk for Judge Reagan.

6. Mrs. Cazalas' formal education, scholarship attainments and exceptional qualifications more than compensate for her limited experience in the active practice of law.

We believe Mrs. Cazalas will be a valuable asset to our office, and an outstanding Assistant United States Attorney.

PLAINTIFF'S EXHIBIT 12B

A-61

United States Department of Justice

UNITED STATES ATTORNEY
Eastern District of Louisiana
New Orleans, Louisiana 70130

March 30, 1972

PERSONAL

Mr. Philip H. Modlin, Director
Executive Office for U.S. Attorneys
4305 Main Justice Building
10th and Pennsylvania Ave., N.W.
Washington, D. C. 20530

Dear Phil:

I goofed. I let Mrs. Mary W. Cazalas' anniversary date (February 15, 1972) slip by. She is doing a fine job for us. She loves her work and is a real asset. She deserves the $2,000 raise I have recommended. I would appreciate your making her raise effective on February 15, 1972 if you can possibly do so.

With special thanks and best regards, I am

Sincerely yours,

/s/ Gerry
GERALD J. GALLINGHOUSE
United States Attorney

United States Government Department of Justice

March 30, 1972

MEMORANDUM

TO: Mr. Philip H. Modlin, Director
Executive Office for U.S. Attorneys

FROM: Mr. Gerald J. Gallinghouse
United States Attorney
Eastern District of Louisiana

SUBJECT: Promotion and Salary Increase for
Assistant U. S. Attorney Mary W. Cazalas
(from $13,300 to $15,300 per annum)

Mrs. Cazalas has rendered outstanding service to our office since February 15, 1971, when she entered on duty, after serving as law clerk for Honorable Godfrey Z. Regan, presiding judge of the Louisiana Court of Appeal, Fourth Circuit.

In compliance with my request, she organized our Research and Appellate Section, which was an important innovation for our office. She has assumed primary responsibility for preparing our appeal briefs and legal memoranda on novel, complex and difficult issues raised in our district courts in civil and criminal cases.

In cooperation with our trial attorneys, she had done the research for and drafted 25 briefs for the U.S. Court of Appeals for the Fifth Circuit. Additionally, she prepared memoranda for our trial judges in 21 cases, participated in the trial of five cases, and argued numerous cases on appeal.

We have been very well pleased with the consistently high quality of Mrs. Cazalas' work. Our district and appellate

judges have praised the thorough research, exceptional writing ability, perceptive analysis of crucial issues, logical presentation and persuasive arguments that characterize her work product. In my judgment, our successful handling of several cases can be directly attributed to Mrs. Cazalas' work.

Mrs. Cazalas is unusually intelligent, conscientious and industrious. She is frequently called upon during trials of important cases to research promptly and thoroughly serious legal questions that are raised by the defense counsel or trial judges, and she always responds, often at considerable personal sacrifice, with an excellent memorandum in support of our position.

Moreover, Mrs. Cazalas has served as our Librarian for the past year. She maintains a current inventory of all books in our library, records and files all library materials received in our office, and actively supervises upkeep and maintenance of our library, which has been improved considerably by her daily attention. One of the most significant contributions to the efficiency of our office is the detailed index that she maintains for the quick and easy use of all our personnel.

Mrs. Cazalas reviews on a continuing basis all opinions in civil and criminal cases as they are rendered by the U. S. Court of Appeals, Fifth Circuit, and she promptly reads all opinions of our United States Supreme Court that seem pertinent to the responsibilities of our office. She prepares and distributes twice monthly a digest of all opinions of special importance to us that appear in the slip opinions, Criminal Law Reporter, Law Week and other legal publications.

In addition to her research and brief-writing specialties,

Mrs. Cazalas has handled sensitively and expertly all types of cases involving the Narcotics Addict Rehabilitation Act. She is considered to be an outstanding authority on narcotics addiction, treatment and rehabilitation, and has written several articles on these subjects. Mrs. Cazalas, who is a very personable and interesting lady, has served effectively as our liaison representative to various agencies, organizations and committees interested in law-enforcement and crime prevention.

When we requested authorization to employ Mrs. Cazalas in our December 18, 1970 memorandum, we recommended that she be paid an annual salary of $16,450 because of her exceptional professional experience and qualifications. Unfortunately, the Department of Justice salary schedule would allow payment of not more than $12,600 as her starting maximum salary, and we almost lost her because of our inability to pay her more. We assured her that we would do our best to obtain maximum salary increases for her, and we were very pleased that she joined our staff. The recent percentage raise increased her salary to $13,300 per annum. Mrs. Cazalas' excellent work has contributed much to the success of our federal law-enforcement efforts, and I am pleased to recommend that her annual salary be increased by at least $2,000 per annum, from $13,300 to at least $15,300, effective as soon as possible, her anniversary date being February 15, 1972. This promotion and salary increase are well deserved as Mrs. Cazalas' performance during the past year has even exceeded our optimistic expectations.

United States Government Department of Justice

MEMORANDUM

February 1, 1973

TO: Philip H. Modlin, Director
Executive Office for United States Attorneys

FROM: Gerald J. Gallinghouse
United States Attorney
Eastern District of Louisiana

SUBJECT: Administrative Pay Increase for
Mrs. Mary W. Cazalas

Mrs. Mary W. Cazalas performs the duties assigned to her in an outstanding manner. She is responsible for all Narcotic Addict Rehabilitation matters and has been cited by the Department of Health, Education and Welfare for her efforts. Mrs Cazalas is also our appellate attorney and during Fiscal Year 1972 briefed and argued 96 criminal and civil appeals.

We recommend that Mrs. Cazalas be given a $2,000 raise effective February 15, 1973.

United States Government Department of Justice

MEMORANDUM

January 3, 1974

TO: Mr. Philip H. Modlin, Director
Executive Office for U. S. Attorneys

FROM: Gerald J. Gallinghouse
United States Attorney
Eastern District of Louisiana

SUBJECT: Administrative Pay Increase for
MARY W. CAZALAS

Mrs. Mary W. Cazalas is Chief of our Appellate Section and during the past year she has handled in excess of 79 Appeals. She has an outstanding record in the Appellate Court and performs her work in a very competent and professional manner. She is also responsible for all Narcotic Addict Rehabilitation matters and has been cited by the Department of Health, Education and Welfare for her efforts.

We recommend that Mrs. Cazalas be given a $2,500.00 raise effective February 17, 1974.

United States Government Department of Justice

MEMORANDUM

May 28, 1974

TO: Mr. Philip H. Modlin, Director
Executive Office for U. S. Attorneys

FROM: Gerald J. Gallinghouse
United States Attorney
Eastern District of Louisiana

SUBJECT: Recommendation for Cash Award and Appropriate Citation for Special Achievement Award for Assistant United States Attorney Mary W. Cazalas $21,500. - G S-13=$250.00

Mrs. Mary Williams Cazalas became an Assistant United States Attorney on February 15, 1971. Her principal assignment had been to brief and argue the appellate cases generated by our office. She has successfully argued in the Fifth Circuit 112 cases. Some of the important public interest cases affirmed have been: H. Rap Brown; Larry Dickinson; Michael Thevis, and Jack Gremillion.

Mrs. Cazalas had also handled all Narcotic Addict Rehabilitation Act cases submitted to the Court by our office. She has processed over 469 such cases. Possessing a Master of Science degree in nursing, she is uniquely qualified in the legal-medical aspect of narcotic addiction. At the request of the Department of Health, Education and Welfare, she has participated in two national conferences concerning drug abuse. She has also visited both the Lexington and Fort Worth drug abuse centers. She has lectured in the drug field at various universities and for Federal and local agencies

in this area.

Mrs. Cazalas has served as a board member and officer of the New Orleans Federal Bar Association and Federal Business Association. She is also a member of the Federal Executive Board.

Mrs. Cazalas' interest in so many work-connected affairs makes her a valuable asset to our office and the Department of Justice. Her untiring energy and gracious manners are admired by all who work with her in our office as well as the court and our client agencies.

We are proud of her accomplishments and recommend this very capable Assistant U. S. Attorney for an appropriate citation and cash award in recognition of her sustained superior performance.

Approved to 18-74
Entrance on duty date: 2/15/71
Present grade, salary & step: 21,500 P.A.
Date of last within grade:
Date of last promotion: 3/17/74
Date of present position: 2/15/71

A-69

United States
Department of Justice

SPECIAL
ACHIEVEMENT
AWARD

Presented to

MARY W. CAZALES

in appreciation and recognition of Sustained
Superior Performance of Duty.

1974

/s/ William B. Saxbe
Attorney General

United States Government Department of Justice

MEMORANDUM

March 21, 1975

TO: Mr. Gerald D. Fines, Acting Director
Executive Office for U. S. Attorneys

FROM: Gerald J. Gallinghouse
United States Attorney
Eastern District of Louisiana

SUBJECT: Administrative Pay Increase
for MRS. MARY W. CAZALAS
Assistant U. S. Attorney

Mrs. Mary W. Cazalas handles most criminal and civil appeals for our office. She performs her work in a competent and professional manner. She also is responsible for our Narcotic Addict Rehabilitation program.

We recommend that Mrs. Cazalas be given a $1,600 raise from $22,700 to $24,300, effective May 11, 1975.

UNITED STATES GOVERNMENT

MEMORANDUM

DATE 2/4/76

TO: Mr. William B. Gray, Director
Executive Office for U. S. Attorneys

FROM: Gerald J. Gallinghouse
U. S. Attorney, E. D. La.

SUBJECT: Administrative Pay Increase for
AUSA Mary W. Cazalas
as of February 15, 1976

I am pleased to recommend an administrative annual pay increase of $1,700 for Mrs. Mary W. Cazalas. This increase, if granted, will raise Mrs. Cazalas' annual salary from $25,500 to $27,200.

This hard-working and highly-respected attorney has rendered loyal, competent and effective legal services during her five years with us. She writes most of our appellate briefs and argues most of our cases before the Fifth Circuit. She also handles most of the petitions for writs of habeas corpus in our district, and manages our sensitive NARA docket.

Mrs. Cazalas is primarily responsible for our successful record on appeals. Only 15 of our appealed 187 cases (criminal-8 of 91, civil-7 of 96) have been reversed by appellate courts.

She is also recognized as a medico-legal expert, and is very helpful in our death, personal injury and medical malpractice

cases.

In addition, Mrs. Cazalas is active and prominent in various professional, governmental and civic affairs. Last year, for example, she served as President of the New Orleans Chapter of the Federal Bar Association. She has received many honors and awards for her outstanding work in anti-crime programs, and her expertise relating to rehabilitation programs for narcotic and drug addicts.

MEMORANDUM

TO: Mr. William B. Gray, Director
Executive Office for U. S. Attorneys

FROM: Gerald J. Gallinghouse
United States Attorney, ED LA.

SUBJECT: Administrative Pay Increase for
MRS. MARY W. CAZALAS
Assistant U. S. Attorney

Mrs. Mary Cazalas will soon be celebrating her sixth anniversary as a member of our Criminal Division legal staff. She is deeply interested in her work, having a medical background as a Registered Nurse, as well as a law degree.

Mrs. Cazalas' medical background has afforded her many opportunities to aid our other attorneys in preparing malpractice cases for the courtroom. She has been called upon to explain records and prepare the necessary arguments for the court.

In a 10-month period, Mrs. Cazalas has written and filed 33 briefs in the Fifth Circuit Court of Appeals, 24 of which were affirmed, 7 reversed and remanded, and several filed with no decision. She has argued the cases set for argument before the Circuit Court.

In the District Court, she has prepared and filed responses to collateral attacks on judgments of conviction, sentences and execution of sentences by the Parole Commission. She has also handled the hearings granted in these cases. Mrs. Cazalas manages our sensitive NARA docket, committing narcotic addicts to the Government's program, also referring numerous patients to other drug treatment programs more

suitable for their problems, such as the V. A. Hospital in New Orleans and Odyssey House Louisiana, Inc.

In addition to her work within this office, Mrs. Cazalas is active and prominent in various professional, governmental and civic affairs. She is a highly respected attorney and an asset to this office and the Department of Justice. We are pleased to recommend that she, as an outstanding Assistant U.S. Attorney, be given a pay increase of $1,800, raising her salary from $29,100 to $30,900, effective February 13, 1977, or as soon as possible thereafter.

Mrs. Mary Cazalas will soon be celebrating her sixth anniversary as a member of our Criminal Division legal staff. She is deeply interested in her work, having a medical background as a Registered Nurse, as well as a law degree.

Mrs. Cazalas' medical background has afforded her many opportunities to aid our other attorneys in preparing malpractice cases for the courtroom. She has been called upon to explain records and prepare the necessary arguments for the court.

In a 10-month period, Mrs. Cazalas has written and filed 33 briefs in the Fifth Circuit Court of Appeals, 24 of which were affirmed, 7 reversed and remanded, and several filed with no decision. She has argued the cases set for argument before the Circuit Court.

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referring numerous patients to other drug treatment programs more suitable for their problems, such as the V. A. Hospital in New Orleans and Odyssey House Louisiana, Inc.

In addition to her work within this office, Mrs. Cazalas is active and prominent in various professional, governmental and civic affairs. She is a highly respected attorney and an asset to this office and the Department of Justice. We are pleased to recommend that she, as an outstanding Assistant U.S. Attorney, be given a pay increase of $1,800, raising her salary from $29,100 to $30,900, effective February 13, 1977, or as soon as possible thereafter.

Dated January 7, 1977

APPENDIX E

United States Government

MEMORANDUM

February 15, 1979

TO: Benjamin R. Civiletti
Deputy Attorney General

FROM: Mary Eastwood
EEO Officer
Offices, Boards, and Divisions

SUBJECT: Mary Cazalas - - EEO complaint and proposed removal

Mary Cazalas, an Assistant U. S. Attorney in the Eastern District of Louisiana, has filed a complaint against the Department, alleging that she has been discriminated against on the basis of sex in that she has been pressured to leave the Office and secure other employment. Her complaint will be investigated shortly. I understand that U.S. Attorney John Volz has written to Mr. Tyson requesting his assistance in securing her removal. It is also my understanding that Ms. Cazalas is actively seeking other employment.

Ms. Cazalas is a non-veteran excepted service career employee, and as such has no procedural rights under the Department's regulations on removal, other than to receive a letter of termination prior to the effective date of termination with a brief statement of the reasons therefor (DoJ Order 1752.1, ch. 6, ¶21(b)). On the other hand, competitive employees and attorneys who are veterans have a right to at least 30 days advance written notice of removal,

at least 7 days in which to respond orally or in writing, a written decision giving the specific reasons for the removal, and a right of appeal to the Merit Systems Protection Board (5 U.S.C. 7511-7514, as amended by the Civil Service Reform Act of 1978).

All but a few female attorneys, and many male attorneys as well, are non-veterans and subject to removal without these procedural rights, without regard to their past length of service in the Department. I believe that this lack of procedural rights is unfair to career non-veteran attorneys in the Department, and that the Department regulations should be revised to require, at a minimum, that the employee be given an opportunity to respond to the charges before a decision to remove is made. In any event, I recommend that before you make a decision to remove Ms. Cazalas that your Office furnish her with the specific reasons for removal and afford her a reasonable length of time to respond to the charges to you in writing.

cc: Mr. Rooney
Mr. Tyson
Mr. Thomas

APPENDIX F

18 Jul 1978 21 Jul 1978

Mr. Kevin Rooney
Assistant Attorney General for Administration

William R. Tyson, Acting Director
Executive Office for U.S. Attorneys

Changes to DOJ Order 1752.1

The Deputy Attorney General has approved the attached changes to paragraphs 3 and 21 of DOJ Order 1752.1. It will be appreciated if you will ask your staff to have these changes published as soon as possible.

Attachment
WPT:glt

Change to DOJ Order 1752.1

Paragraph 21 of Chapter 6 is amended to read:

21. *PROCESSING ADVERSE ACTIONS*

a. An excepted service employee who is protected under the law and Civil Service Commission Regulations (see Appendix 6) is entitled to the procedures contained in Paragraph 10c.

b. An excepted service employee with no protection under law or regulations is to be given a letter of termination prior to the effective date of the termination. The letter is to provide a brief statement of the reasons for the termination and is to specify the effective date of the termination.

c. (Deleted)

Approved: X Date: 7/21/78

Disapproved: Date:

Other:

/s/ Benjamin R. Civiletti
Benjamin R. Civiletti
Deputy Attorney General

CHANGE TO DOJ ORDER 1752.1

Paragraph 3 of Chapter 1 is amended to read:

3. *Exclusions*

a. Officials whose appointments are required to be confirmed by or made with the advice and consent of the Senate.

b. Employees of the Federal Bureau of Investigation.

c. Re-employed annuitants.

d. Assistant United States Attorneys appointed pursuant to 28 U.S.C. 542.

Approved: X Date: 7/21/78

Disapproved: Date:

Other:

/s/ Benjamin R. Civiletti
Benjamin R. Civiletti
Deputy Attorney General

APPENDIX G

March 22, 1979

William P. Tyson, Acting Director
Executive Office for U.S. Attorneys

Removal of Assistant United States Attorney Mary Cazalas

Mr. Benjamin R. Civiletti
Deputy Attorney General

Attached for your signature is a letter (Tab A) effecting the removal of Ms. Mary Cazalas, Assistant United States Attorney, Eastern District of Louisiana, in accordance with your delegated authority (28 CFR 0.15(b) (3) (i)).

The removal is supported by information submitted by United States Attorney John Volz (Tab B). He indicates that Ms. Cazalas is incompetent as a prosecutor, cannot be supervised, and cannot be depended upon to maintain the strict confidentiality of cases which are assigned to her. The working relationship between the United States Attorney and Ms. Cazalas has deteriorated to the point where she demands that her attorney be present when she speaks with Mr. Volz on any subject.

Ms. Cazalas filed with Ms. Mary Eastwood, the Department's EEO Officer, a discrimination complaint alleging that she has been pressured to resign from the United States Attorney's Office because of her sex. An EEO counselor informally investigated her complaint, and attached is a copy of the counselor's report concluding that the evidence does not support her claims of discrimination (Tab C). Since the complaint was not resolved to Ms. Cazalas' satisfaction at the informal stage of the EEO process, Ms. Eastwood has

forwarded the complaint to the Department's Internal Audit Staff for a formal investigation.

On February 15, 1979, Ms. Eastwood sent you a memorandum concerning Ms. Cazalas' EEO complaint and proposed removal in which she requests that you extend to Ms. Cazalas the same rights of advance notice and reply conveyed to competitive employees and attorneys who have veteran's preference even though Ms. Cazalas has no such procedural rights according to Department Order 1752.1.

I recommend, however, that you not accord these rights to Ms. Cazalas since neither she nor any other Assistant United States Attorney is covered by the Order. On July 21, 1978, you approved the exclusion of Assistants from the Order (Tab D).

I have discussed with John Volz the possibility of deferring this removal action until the formal EEO complaint is resolved. (Mr. McBurroughs, EEO Unit, OMF, says this will take at least 4 - 5 months, probably longer.) John Volz strongly feels that the removal should not be postponed any longer because Ms. Cazalas' presence in the office is detrimental to office morale. He says that Ms. Cazalas is not doing productive work and that she spends most of her time working on personal business, including this proposed removal action.

At her request, I let Ms. Cazalas tell me her side of the story for over two hours on March 7, 1979. From her viewpoint, her professional conduct has been virtually impeccable and her actions founded in high purpose and correctness. As to her supervisors, associates and judges who are critical of her, she subscribes improper motives, harrassment, discrimination, and legal error. She has a very high opinion

of herself. While she is able to explain each and every allegation away to her apparent satisfaction by placing the blame on the other party or parties, I do not feel that her explanations are on the mark.

I recommend that the removal action (Tab A) be signed. Ms. Cazalas can then pursue whatever further action she chooses, and we certainly may anticipate that she will continue to fight.

Approved:_____
(letter signed) Benjamin R. Civiletti
Deputy Attorney General

Disapproved: _____
Benjamin R. Civiletti
Deputy Attorney General

Other: _____
Benjamin R. Civiletti
Deputy Attorney General

WPT: FXM: DWG:RD: 3-20-79

cc: subject, chron, dag, district

APPENDIX H

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D. C. 20630

April 4, 1978

PERSONAL AND CONFIDENTIAL

TO BE HAND DELIVERED BY
THE U. S. ATTORNEY

Ms. Mary Cazalas
Assistant U. S. Attorney
New Orleans, Louisiana

Dear Ms. Cazalas:

This is to inform you that under the authority delegated to me by 28 CFR 0.15(3)(i), I am removing you from your position of Assistant United States Attorney for the Eastern District of Louisiana. This removal will be effective on Friday, April 20, 1979.

Your removal is based on information submitted by Mr. John Volz, United States Attorney, which shows that your professional performance and judgment have been unsatisfactory, that you will not submit to proper supervision by those in authority over you, and that you cannot be trusted to maintain the confidentiality of matters assigned to you.

If you have any questions regarding the regulations applicable to this action, you may telephone Mr. Daniel W. Gluck, Personnel Officer, Executive Office for U. S. Attorneys, on FTS 633-4458.

Sincerely,

/s/ Benjamin R. Civiletti
Deputy Attorney General